SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 482

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER,

vs.

TAFT B. SCHREIBER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

No. 1258-61-4

FEDERAL COMMUNICATIONS COMMISSION, Petitioner,

v.

TAFT B. SCHREIBER, AND MCA, INC., Respondents

PETITION FOR ENFORCEMENT OF A SUBPOENA AND ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION—FILED SEPTEMBER 22, 1961.

To the Honorable Judges of the United States District Court for the Southern District of California, Central Division:

Petitioner, Federal Communications Commission, pursuant to Sections 401(a), 401(b), 409(f) and 409(g) of the Communications Act of 1934, as amended (47 U.S.C. §§ 401 (a), 401(b), 409(f) and 409(g)) petitions this Honorable Court for an order commanding the respondents MCA, Inc., a corporation organized and doing business under the laws of the state of Delaware, and Taft B. Schreiber, an indivdual, both with offices and place of business located at 9370 Santa Monica Boulevard, Beverly Hills, California, to appear before the said Commission, at a time and place to be subsequently determined by it and to bring with them and to produce certain books, papers, and documents as required by a subpoena duces tecum lawfully issued by the Federal Communications Commission (hereinafter some- [fol. 3] times referred to as "the Commission") on October 17, 1960 and duly served upon respondent Schreiber (a copy of which, together with the return of service thereof, is attached as Exhibit 1 to the Petition) and the orders of the Commission released January 27, 1961, and February 3, 1961 and duly served upon respondents (copies of which are attached as Exhibits 2 and 3 to the Petition).

I

Jurisdiction is conferred upon this Court by Section 401(a) of the Communications Act of 1934, as amended (47 U.S.C. § 401(a)).

II

The Federal Communications Commission is the agency of the United States Government charged by Section 1 of the Communications Act of 1934, as amended (48 Stat. 1064; 47 U.S.C. § 151) with executing and enforcing the provisions of that Act.

III

The subpoena and orders which the Commission seeks to enforce were issued on October 17, 1960, January 27, 1961, and February 3, 1961, respectively, in an investigatory proceeding conducted by the Commission pursuant to Section 403 of the Communications Act of 1934, as amended (47 U.S.C. § 403). That section empowers the petitioner to initiate any inquiry on its own motion relating to the enforcement of any of the provisions of the Communications Act or concerning any question which may arise under any of the provisions of that Act. Concomitant with this power is the authority to make and enforce any orders relating to the matter concerning which the inquiry is had as well as the authority conferred in Section 409(e) of the Communications Act (47 U.S.C. § 409(e) to require by subpoena the attendance and testimony of witnesses and the production of all books, papers, schedules of charges, [fol. 4] contracts, agreements and documents relating to any matter under investigation.

IV

Pursuant to the duties and the authority of petitioner referred to above the Commission is now, and at all relevant times has been, carrying on an investigation (Federal Communications Commission Docket No. 12782) to determine, principally, whether the television networks, Commission licensees, or others may be arbitrarily restricting or excluding the broadcast of otherwise meritorious programs or advertising material. The Commission determined in its order of February 27, 1959, that that question could be be answered only after a comprehensive fact-

finding investigation into the daily operation of the industry in the creation and selection of programs and advertising material for television exhibition.

V

In the course of said investigation, pursuant to the authority conferred upon petitioner by Section 403 of the Communications Act (48 Stat. 1094; 47 U.S.C. § 403), petitioner on October 17, 1960 issued its subpoena duces tecum directed to respondent Schreiber and signed by James D. Cunningham, Chief Hearing Examiner of the Federal Communications Commission, and directing respondent Schreiber, as Vice President of MCA, Inc., to appear on October 21, 1960 at 10:00 A.M. at the courtroom of the United States Court of Appeals for the Ninth Circuit, Los Angeles, California, before Chief Hearing Examiner James D. Cunningham to testify and to produce specified documentary evidence as described in an Annex attached to the subpoena. On October 17, 1960, said subpoena was duly served on respondent Schreiber, at 9370 Santa Monica Boulevard, Beverly Hills, California.

[fol. 5] VI

On October 21, 1960 at 10:00 A.M. at the courtroom of the United States Court of Appeals for the Ninth Circuit, Los Angeles, California, a hearing was convened by the aforesaid James D. Cunningham for the purpose, among others, of receiving the testimony and documentary evidence called for by the subpoena. At said hearing respondent Schreiber appeared, accompanied by an attorney, Allen E. Susman, Esquire, and acknowledged service upon him of the aforesaid subpoena, acknowledged that he was in possession of the documentary evidence called for by Annex B thereof, and refused to produce the documentary evidence called for by Annex B to the subpoena. Respondents Schreiber and MCA, Inc. applied to the Commission pursuant to Section 5(d)(2) of the Communications Act (47 U.S.C. § 155(d)(2)) for review of the rulings and orders of the Presiding Officer. Upon review the Commission concluded that the refusal of respondents to testify and produce the required information and data was without warrant in law and was seriously impeding and

frustrating the Commission's purposes as stated in its orders issued in the proceeding.

VII

By order released January 27, 1961 (Exhibit 2 to the Petition) the Commission ordered the Presiding Officer to reconvene the hearing and respondents were "commanded to appear before the said Presiding Officer at such time and place as he may designate and to testify in the instant proceeding regarding all matters deemed relevant by said Presiding Officer to this inquiry, as may be directed; and to produce all of the information and data required by the said Presiding Officer; all evidence, information and data deemed relevant by the Presiding Officer to be produced or provided as directed herein shall be included in the public [fol. 6] record of these proceedings *except* in those instances where the Presiding Officer orders that evidence, information or data be produced on non-public basis as provided by our Orders in these proceedings. In the event the Presiding Officer so acts, such evidence, information, and data shall not be publicly disclosed except by direction of the Commission; . . . that in the event that the said persons or any of them shall fail to appear as directed, or having appeared shall fail fully to comply with this Order, or shall fail to testify and produce the information and data as required by said subpoenas or by order or direction of the Presiding Officer herein, that an action be filed forthwith in the appropriate United States District Court to enforce compliance with said subpoenas and with the provisions of this Order."

On February 3, 1961, the Commission released a further order (Exhibit 3 to the Petition) that the investigatory proceeding be reconvened on March 8, 1961, at Los Angeles, California, and ordering respondents to appear and to testify in the proceeding and to produce all the information and data required by the subpoena (Exhibit 1 to the Petition). The above-described Orders were duly served upon respondents both by registered mail and in person.

The proceeding was reconvened in Los Angeles, as ordered, and the respondents were present in the hearing room and were represented by counsel. Again respondents

refused to testify and produce the data required by Annex B of the Commission's subpoena.

The documentary evidence and testimony sought to be obtained pursuant to the subpoena herein described and by the Commission's Order of January 27, 1961, are relevant, material and essential to the purposes set forth by the Commission in its Order of February 27, 1959, initiat- [fols. 7-8] ing this proceeding, and its supplemental Order of November 10, 1959, (which will be separately filed) enlarging the scope of the proceeding. Moreover, the Commission has found that the public interest requires that the information and documentary evidence ordered to be produced pursuant to the aforementioned subpoena and Commission's Orders be received in a public hearing.

Wherefore, petitioner prays this Honorable Court to issue an order requiring the respondents MCA, Inc. and Taft B. Schreiber (to appear before a Presiding Officer duly appointed by the Commission at a time and place to be fixed by the Commission, to testify and to produce books, papers and documents in accordance with the abovementioned subpoena and orders issued by the Commission and duly served upon the respondents) and for such further relief as the Court may deem appropriate.

Respectfully submitted, Francis C. Whelan, United States Attorney. /s/ Jack F. Blair, Assistant U. S. Attorney, Assistant Chief, Civil Division: /s/ Frederick M. Brosio, Jr., Assistant U. S. Attorney.

Of Counsel: William H. Orrick, Jr., Assistant Attorney General, Department of Justice. Dee W. Pincock, Acting General Counsel, Federal Communications Commission. John J. O'Malley, Jr., Counsel, Federal Communications Commission, Attorneys for Petitioner.

[fol. 8a] EXHIBIT 1 TO PETITION

FCC Form 766
Subpoena Duces Tecum (Original)

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION

Docket No. 12782

In The Matter of STUDY OF RADIO AND TELEVISION NETWORK BROADCASTING

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To Taft Schreiber, Vice President, MCA Inc., Universal City, California, Greeting:

You are hereby commanded under penalty of law to be and appear in your proper person before the Federal Communications Commission or Chief Hearing Examiner James D. Cunningham (Name and official title of person authorized to take depositions) U. S. Court of Appeals for the Ninth Circuit, at 312 North Spring Street in the city of Los Angeles, California on the 21st day of October, 1960, at 10:00 o'clock A.M., that day, to testify.

And you are hereby commanded to bring with you and produce at said time and place the following books, papers, and documents: As described in the attached Annex.

[fol. 9] ANNEX

(A) A list by name or title of all television programs whether series programs, special programs, or otherwise, which appeared or were exhibited by or through the facilities of the television networks operated by NBC, CBS, or ABC since September 1, 1958, which programs were produced by MCA, Inc. or Revue Productions Inc. and/or in which MCA, Inc. or Revue Productions, Inc. has or had a financial or proprietary interest or with regard to which MCA, Inc. or Revue Productions, Inc. is or was entitled to receive or has received a percentage of the profits or

other compensation or fees in connection with the production or exhibition of such programs other than remuneration or compensation for the representation as agent of individual natural persons as talent.

(B) A list of all television programs whether series programs, special programs, or otherwise, which appeared on or were exhibited by or through the facilities of the television networks of NBC, CBS, or ABC, since September 1, 1958, in which MCA, Inc. or any predecessor affiliate or subsidiary of MCA, Inc. acted as packager and/or, by agreement or otherwise, is entitled to receive or has received a percentage of the cost or selling price of said program or was or is entitled to receive or has received other compensation, remuneration or fees in connection with the packaging, licensing for broadcast or selling of said program, otherwise than as remuneration or compensation for the representation as agent of individual natural persons as talent.

[fol. 10] PROOF OF SERVICE

STATE OF CALIF.
COUNTY OF LOS ANGELES, SS:

Earle L. Baugher, being first duly sworn, says:

I am a citizen of the United States of America, over the age of eighteen years, and not a party to or in any way interested in the proceeding in which this subpoena was issued.

On the 17th day of Oct., 1960, I served the within subpoena on the witness named therein at the address shown, by—(Check method used.)

X (1) Delivering to and leaving with the witness personally a copy of said subpoena and at the same time exhibiting to said witness this original, (or if not able to effect service in this manner)

(2) By sending a copy of the within subpoena to the witness by registere mail, or

(3) By leaving a copy at the principal office or place of business, to wit:

Served Taft Schreiber at 9370 Santa Monica Blvd., Beverly Hills, Calif., on the 17th day of Oct., 1960, at 6:30 P.M.

Mileage: $2.00
Fee: .50
Total: $2.50

Earl L. Baugher, Deputy U. S. Marshal.

Subscribed and sworn to me before this — day of —, 19—.

——, Notary Public.

I certify that the person named herein was in attendance as a witness at — on —.

——; ——, (Name of Person Certifying), Official Title.

[fol. 11] EXHIBIT 2 TO PETITION

B
FCC 6-122
99337

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

Docket No. 12782

In the Matter of STUDY OF RADIO AND TELEVISION NETWORK BROADCASTING

ORDER

At a session of the Federal Communications Commission held at its offices in Washington, D. C. on the 25th day of January, 1961:

The Commission having before it the following:

1) Petitions filed by Dick Fishell, Betty Langley, Mary Rothschild, Dick Fishell & Associates and Promotions Unlimited on October 31, 1960; and filed by MCA Inc. and Taft B. Schreiber on October 28, 1960, seeking review and

reversal of certain actions of the Presiding Officer, James D. Cunningham, in the instant proceeding;

2) Memorandum Opinion adopted on November 25, 1960, by the Chief Hearing Examiner acting as Presiding Officer in the instant proceeding;

3) Memorandum in Support of Opinion and Proposed Action and in Opposition to Petitions to Review, filed by the Broadcast Bureau on December 2, 1960;

4) Letter dated December 8, 1960, filed with the Commission on December 13, 1960, by counsel for Dick Fishell, Betty Langley, Mary Rothschild, Dick Fishell & Associates and Promotions Unlimited;

5) Reply Petition of MCA Inc. and Taft B. Schreiber, filed on December 27, 1960.

This investigatory proceeding, a continuation and expansion of the Commission's Network Study, was initiated by Commission Order of February 27, 1959 (FCC 59-166, Mimeo 69484, 24 F.R. 1605), pursuant to Sec. 403 of the Communications Act of 1934, as amended. Our Order directed that inquiry be made to determine the policies and practices pursued by networks and others in the acquisition, ownership, production, distribution, selection, sale and licensing of programs for television exhibition and the reasons and necessity in the public interest for said policies and practices. It further ordered that, for the purposes of said investigation, Chief Hearing Examiner, James D. Cunningham, constitute a board within the meaning of [fol. 12] Section 5(d) of the Communications Act of 1934, as amended, (47 U.S.C.A. 155(d)), and that he convene, conduct and carry on said proceeding at such times and places as he should determine would best facilitate the dispatch of the business of said proceeding and serve the ends of justice; that he preside over said proceeding, receive evidence, make a record thereof, and certify that record to the Commission; and in connection with said investigatory proceeding, James D. Cunningham, sitting as a board and Presiding Officer, as aforesaid, be authorized and empowered to administer oaths and affirmations, subpoena wifnesses, compel their attendance, take evidence and require the production of books, papers, correspondence, memoranda and other records deemed relevant to the inquiry and to perform all other duties in connection therewith as authorized by law.

It was further ordered, that the said investigatory proceeding be a public proceeding except that the said Presiding Officer be empowered to order non-public sessions where and to the extent that said Presiding Officer should determine that the public interest, the proper dispatch of the business of said proceeding, or the ends of justice would be served thereby.

On November 10, 1959, the Commission issued its Supplemental Order for Investigatory Proceeding (FCC 59-1136, Mimeo 80097, 24 F.R. 9275), in which it ordered and directed that the said investigatory proceeding be amended and enlarged to determine the policies, practices, mechanics and surveillance pursued and carried out by networks, station licensees and others in connection with the acquisition, ownership, production, distribution, selection, sale and licensing of programs for radio and television exhibition and the policies and practices pursued by networks, station licensees and others in connection with the selection, presentation and supervision of advertising material for broadcast to the public and the reasons and necessity in the public interest for said policies and practices, and activities.

It was the intention of the Commission in issuing both of the above Orders to institute a broad and comprehensive inquiry to establish a *public record* of the relevant policies, practices, facts and circumstances involved in the production, creation, selection, sale, licensing and exhibition of programs broadcast through the facilities of its licensees. Although the Commission empowered the Presiding Officer to accept evidence, information and data on a non-public basis, it was the Commission's express intent that the proceedings be public and that the record be available to the public, station licensees, the broadcast industry, to the Commission and to Congress. We think it clear that all of such groups have a proper interest in the complex and generally unknown processes involved in the production, sale, distribution, et cetera, of broadcast programming and, more particularly, in the factual basis for any action—legislative, rule-making or licensing—which the Commission may take as a result of its inquiry into these matters. Moreover, the policies and practices into which inquiry is and has been made herein, involve many-sided transaction between [fol. 13] diverse and partially competitive (but also par-

tially complementary) components and members of the same industry, such as networks, advertising agencies, program producers, program packagers, talent agencies, etc. If we are to obtain a full and rounded picture of such transactions, it is highly desirable that the facts, information, data and opinion supplied by one group or individual be known to other groups and individuals involved, so that they may verify, refute, explain, amplify or supplement the record from their own diverse points of view. In our view, a public investigatory hearing is the most effective means to this end. For these reasons, among others, we determined that public proceedings should be the rule herein, and that non-public procedures should be used only in those extraordinary instances where disclosure would irreparably damage private, competitive interests and where such interests could be found by the Presiding Officer to outweigh the paramount interest of the public and the Commission in full public disclosure. It was not the Commission's intention that the non-public procedure be used, solely for their own convenience, by private persons who might be called as witnesses. Nor was it the Commission's intention to accept any information on a basis which would prevent its disclosure if the public interest so requires.

Initial sessions of the instant proceeding were held in May, 1959, at which the principal officers of the three national television networks (CBS, NBC and ABC) testified and gave evidence, principally of a documentary nature. During the week beginning July 7, 1959, television executives of several major advertising agencies testified and gave other evidence, disclosing in depth and detail their activities in the television program selection process. Following the issuance of its Order of November 10, 1959, and beginning on December 7, 1959, the Commission *en banc* heard approximately one hundred witnesses representing virtually all interested segments of the listening and viewing public as well as many persons from the industry.

From October 10 through October 25, 1960, public sessions of the inquiry were held in Los Angeles, California, devoted to the receiving of testimony and other evidence concerning the activities, functions, policies and practices of a number of Hollywood-centered television production companies, talent agencies, talent representatives, program

packagers and/or sales representatives, West-coast representatives of the National Association of Broadcasters, and several principal officers of Guilds which act as collective bargaining agents for performing and other talent in television programming. Also heard were representatives of companies and individuals who engaged in the business of seeking to "plug" various products and services as a part of the subject matter of television programming.

[fol. 14] The Presiding Officer, as part of his duty under the said Orders, was empowered to make and enforce reasonable rules for the conduct of the proceeding. Pursuant to that authority the Presiding Officer established "ground rules" under which each witness was permitted to be accompanied by and to consult with counsel during the course of his testimony. Counsel were not permitted to participate directly in the proceedings by means of oral objections or arguments during the testimony, but were permitted to make appropriate motions directed to subpoenas. With a single insignificant exception, witnesses were uniformly permitted to consult with their counsel while they were on the stand, and to voice any objections or claim of right or privilege that counsel might suggest.

On October 17, 1960, the Presiding Officer issued a subpoena *duces tecum* directed to Taft Schreiber, Vice-President of MCA, Inc., commanding him to appear and produce certain documents. Schreiber appeared on October 21, 1960, and produced part of the material demanded by the supoena. He refused a list of the programs as to which MCA, Inc., acts as "packager." Although he was in possession of the required document in the Courtroom, he refused to produce it unless the Comission agreed to accept it as "confidential." When directed to produce the document by the Presiding Officer, and to testify fully regarding matters relevant to the inquiry, Schreiber declined to proceed with his testimony and left the stand.

On October 18, 1960, the Presiding Officer issued a subpoena *duces tecum* to Promotions Unlimited and Dick Fishell & Associates, and subpoenas *ad testificandum* to Dick Fishell, Mary Rothschild and Betty Langley which were returnable at the Federal Courthouse in Los Angeles, California, on October 24, 1960. All the named persons appeared and their counsel moved to quash the subpoenas

on the several grounds set forth in the record and in the pleadings herein. The motion was denied by the Presiding Officer. All such persons were sworn as witnesses and each declined, on the advice of counsel, to testify in the proceeding.

In his Memorandum Opinion, the Presiding Officer reaffirmed his view that the "ground rules" established for the participation of counsel were valid and found that the testimony and documents sought from the aforesaid persons were relevant to the inquiry and essential to the fulfillment of its purposes, that the requests for confidential treatment were without merit, and that the documents required of Promotions Unlimited and Dick Fishell & Associates were adequately described in the subpoenas addressed to them. He found further that Mr. Schreiber had acted in "complete defiance" of Commission authority and that the refusal of all the named witnesses to testify and to produce information and data called for by the subpoenas in question "constitutes contumacy and tends to frustrate this inquiry."

[fol. 15] As stated earlier herein, all persons who refused to testify have now applied to the Commission pursuant to Section 5(d)(2) of the Communications Act for review of the rulings and orders of the Presiding Officer.

Having reviewed the record and the pleadings herein, we have concluded that the rules, orders and directions of the Presiding Officer with regard to Taft Schreiber, MCA, Inc., Promotions Unlimited, Dick Fishell & Associates, Dick Fishell, Mary Rothschild and Betty Langley, were clearly valid and proper and within the authority of the Presiding Officer as set forth in the Commission's Orders of February 27 and November 10, 1959. The refusal of all of the said witnesses to testify and produce the required information and data was without warrant in law and seriously impedes and frustrates the Commission's purposes as stated in those Orders.

The contention of all the various petitioners that the information sought of them by the Commission should be treated as "confidential" is without merit. The claim that disclosure of such information would harm them irreparably is totally unsupported by their pleadings and contrary to the record. None of the information sought by the subpoenas now outstanding is detailed financial information of

the sort involved in *FCC v. Cohn, et al,* 154 F. Supp. 899 (D. Ct., S.D.N.Y.). Moreover, it appears that information and testimony of exactly the same kind and type as that now offered as "confidential" by MCA was produced by witnesses for William Morris and other competitors of MCA without question as to its inclusion in the public record. Evidence similar to that sought from the other petitioners was freely given by another person engaged in a similar business. It appears further that, in eliciting testimony and requesting data from such other persons, the Presiding Officer and Commission counsel have made every effort to avoid public disclosure of detailed internal financial information or detailed contractual arrangements which might in fact irreparably harm private interests without sufficient compensating benefit to the public. We concur in the Presiding Officer's finding on this record that there is nothing of a confidential nature in the matters sought to be elicited from these petitioners which would require that their testimony be made part of the non-public docket.

The contention of all the various petitioners that the "ground rules" established by the Presiding Officer violate their "right to counsel" is likewise without merit. All witnesses, including petitioners, have been given a full and fair opportunity to consult with counsel while on the stand. We concur in the Presiding Officer's requirement that a witness request permission to consult with counsel. We have been shown nothing indicating that this requirement has impeded any witness's consultation with his counsel more than was necessary to maintain decorum and keep the proceeding under control. We also concur in the Presiding Officer's view that permitting counsel to make [fol. 16] appropriate motions directed to subpoenas (prior to any testimony by the witness under subpoena) does not unduly disrupt the proceedings, but that to permit counsel for any and all witnesses to object to questions asked of their witnesses or other witnesses, to object to the receipt of documentary evidence or to the conduct of the proceedings in general, and to present argument in support of such objections or otherwise (all of which rights are requested by petitioners), would unduly disrupt, obstruct and prolong these broad investigatory proceedings. In

view of (1) the nature and purpose of these proceedings, which are not intended to and cannot adjudicate the rights of any person, (2) the protection which the Presiding Officer's "ground rules" already accord the legitimate interests of all witnesses (which rules, as applied herein, have permitted participation by counsel for petitioners and others exceeding that afforded by many other investigatory bodies), and (3) the seriously disruptive effect of the additional rights of participation for which petitioners contend, we do not believe that Section 6(a) of the Administrative Procedure Act, assuming that it is applicable to these proceedings, is violated by the procedures followed by the Presiding Officer and here confirmed and adopted.

We further reject the contention of petitioners MCA, Inc. and Taft Schreiber, raised for the first time in their reply pleadings, that these proceedings are a nullity as to them because of the failure of the Commission to publish rules of procedure for them of sufficient particularity. Section 1.10 of our Rules, governing all investigations or other informal proceedings, is phrased in general terms to allow such procedure as we deem appropriate, because each such proceeding tends to be unique, requiring its own procedure. Section 1.10 is, moreover, supplemented by the procedural provisions of our Orders of February 27 and November 10, 1959, herein, both of which were published in the Federal Register. We think that such publication satisfies the requirements of Section 3 of the Administrative Procedure Act, particularly in view of the fact that no person called as a witness in these proceedings could fail to be informed of the applicable procedures. Certainly petitioners are not being forced to pursue remedies which are not generally known. Nor is this a case in which, absent publication of more particularized rules of procedure or organization, some substantive or procedural right of petitioners to fair treatment would be placed in jeopardy.

Similarly, we reject the contention of petitioners Fishell, *et al*, as to the "vagueness" of the subpoenas *duces tecum* addressed to them. We think it clear that these petitioners, who state that they are engaged in a business which deals with "the problem of legitimate exposure to the public of products and services" are in position to

supply the Commission with a list of those persons for whom they have performed such services by means of, or through, broadcast matter since September 1, 1958 (as required by the subpoenas outstanding) without further clarification.

[fol. 17] This leaves the question of relevance of the specific matter sought to the inquiry herein. As to this question, the Commission finds:

(1) Evidence, information and data as to the packaging of programs and the policies, practices and activities of MCA, Inc., in connection with the production, casting, packaging, selection and sale of programs for television exhibition are relevant and essential to this proceeding. It is apparent from the record that MCA, Inc., (a) represents a large share of the talent, both acting and creative, engaged in television, programming; (b) produces television programs; (c) packages and/or sells such programs; (d) maintains and leases production facilities for such programs and generally engages, on a large scale, in all facets of television program production. The record of the proceeding to date clearly establishes that failure fully to explore the policies, practices and activities of MCA, Inc., in connection with television programming would seriously impair, if not render nugatory, any attempt on the Commission's part to understand and delineate the policies, practices and activities involved in the creation, production, sale and licensing of television filmed programs;

(2) The documentary evidence required by the subpoenas herein is essential and relevant to the subjects and matters set forth in the Commission's Orders, aforesaid;

(3) Evidence, information and data regarding the policies, practices, activities and relationships of Dick Fishell & Associates, Promotions Unlimited, Dick Fishell, Mary Rothschild and Betty Langley, in connection with the production of programs for television exhibition and the selection of advertising material for broadcast to the public are relevant and essential to the Commission's inquiry;

(4) All subpoenas herein constitute valid and proper exercise of the Commission's authority to require by

subpoena the attendance and testimony of witnesses and the production of books, papers, etc., relating to any matter under investigation as provided in Section 409(e) of the Communications Act of 1934, as amended; and said subpoenas were duly and lawfully served on petitioners herein and constitute lawful commands of the Commission requiring the applicants herein to attend and testify and produce the books, papers, documents and other things specified therein and said subpoenas continue and remain in full force and effect.

We have discussed the various questions raised by petitioners herein and have reaffirmed and elaborated the directions for the conduct of these proceedings as there seems to have been some doubt as to the correct interpretation of our prior orders herein. We have done so in order to make quite clear the Commission's intention and purposes in these [fol. 18] proceedings. However, in view of the fact that neither the orders of the Presiding Officer nor those of the Commission can ultimately compel testimony or documents from petitioners, over their objections, without the aid of a Federal Court proceeding in which all petitioners' rights may be asserted and full review may be had, we hold that the orders and directions of the Presiding Officer as to relevance and public disclosure of evidence information and data are interlocutory in nature, do not of themselves "aggrieve" any person, and are not, as of right, appealable to the Commission.

Accordingly, it is Ordered, that the petitions to review and reverse the orders and directions of the Presiding Officer, James D. Cunningham, herein be and hereby are dismissed and said orders and directions be and hereby are affirmed and adopted by the Commission;

That, the application by MAC, Inc. and Taft B. Schreiber for oral argument be and is hereby denied;

It is Further Ordered, that the said James D. Cunningham reconvene said investigatory proceeding at a time and place to be designated by him;

And, Dick Fishell, Betty Langley and Dick Fishell & Associates, Mary Rothschild and Promotions Unlimited, and MCA, Inc. and Taft B. Schreiber and each of them is Hereby Commanded to appear before the said Presiding

Officer at such time and place as he may designate and to testify in the instant proceeding regarding all matters deemed relevant by said Presiding Officer to this inquiry, as may be directed; and to produce all of the information and data required by the said subpoenas and such other information and data as may be deemed relevant and ordered or directed to be produced by the said Presiding Officer; all evidence, information and data deemed relevant by the Presiding Officer to be produced or provided as directed herein shall be included in the public record of these proceedings *except* in those instances where the Presiding Officer orders that evidence, information or data be produced on non-public basis as provided by our Orders in these proceedings. In the event the Presiding Officer so acts, such evidence, information and data shall not be publicly disclosed except by direction of the Commission;

It is Further Ordered, that in the event that the said persons or any of them shall fail to appear as directed, or having appeared shall fail fully to comply with this Order, or shall fail to testify and produce the information and data as required by said subpoenas or by order or direction of [fol. 19] the Presiding Officer herein, that an action be filed forthwith in the appropirate United States District Court to enforce compliance with said subpoenas and with the provisions of this Order.

Federal Communications Commision, Ben F. Waple,
Acting Secretary.

Released: January 27, 1961

[fols. 20-20a] EXHIBIT 3 TO PETITION

FCC 61M-173
99905

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C.

Docket No. 12782

In the Matter of STUDY OF RADIO AND TELEVISION NETWORK BROADCASTING

ORDER

Pursuant to the order of the Commission released January 27, 1961 (FCC 61-122; Mimeo. No. 99337), It Is Hereby Ordered, this 3rd day of February, 1961, that the public sessions of this investigatory proceeding be reconvened at 10:00 a.m., Wednesday, March 8, 1961, in the courtroom of the United States Court of Appeals for the Ninth Circuit, United States Courthouse and Post Office Building, 312 North Spring Street, Los Angeles, California, and that such sessions continue from day to day thereafter as ordered by the Presiding Officer; and Dick Fishell, Betty Langley, Dick Fishell & Associates, Mary Rothschild and Promotions Unlimited, MCA, Inc., and Taft B. Schreiber, and each of them, is hereby commanded to appear at the said time and place and to testify in the proceeding in accordance with the order of the Commission aforementioned and the orders and directions of the Presiding Officer herein and to produce all of the information and data required by the subpoenas heretofore duly served upon them and each of them in the proceeding.

Federal Communications Commission, James D. Cunningham, Chief Hearing Examiner, Presiding Officer. Ben F. Waple, Acting Secretary.

Released: February 3, 1961.

[fol. 20b] PETITIONER'S EXHIBIT No. 1

FCC 59-166
69484

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

Docket No. 12782

In the Matter of STUDY OF RADIO AND TELEVISION NETWORK BROADCASTING

ORDER FOR INVESTIGATORY PROCEEDING

At a session of the Federal Communications Commission held at its offices in Washington, D. C., on the 26th day of February, 1959, it appearing to the Commission that:

Whereas, as part of a study of radio and television network broadcasting as provided for by Public Law 112, 84th Congress, 1st Session, and Delegation Order No. 10, the Commission has been engaged in a study of television programming and in the course of such study has obtained information and data regarding the acquisition, production, ownership, distribution, sale, licensing, and exhibition of programs for television broadcasting; and

Whereas, the Commission has considered the matter and has determined that said information and data raise questions relevant to said study as to the existence and prevalence of policies and practices in connection therewith, which may affect the public interest in the larger and more effective use of television; and

Whereas, the Commission has determined that a formal inquiry is necessary to provide the Commission with information and data which are necessary to determine whether and the extent to which such policies and practices exist and which will be of value to the Commission in determining what, if any, rules, regulations, legislation or other actions are necessary or desirable in the public interest in connection with the said matters; and

Whereas, the Commission is empowered to perform any and all acts, make such rules and regulations, issue orders not inconsistent with the Act, as may be necessary in the

execution of its functions and generally to encourage the larger and more effective use of radio in the public interest (47 U.S.C.A. 154(i) and 47 U.S.C.A. 303(f), (g)-), and to make such special regulations applicable to radio stations engaged in chain broadcasting as the public interest, convenience, or necessity requires (47 U.S.C.A. Sec. 303(i)-); and

[fol. 20c] Whereas, under the provisions of the Communications Act of 1934, as amended, this Commission is empowered and directed to grant construction permits and station licenses, or modifications or renewals thereof, for broadcast stations only after it has made a determination that the public interest, convenience, or necessity would be served thereby; and

Whereas, the Commission is required to report to Congress information and data considered of value in the determination of questions connected with the regulation of broadcasting and to make specific recommendations to Congress as to additional legislation which the Commission deems necessary or desirable (47 U.S.C.A. 154(k)-).

Now Therefore, It Is Ordered, That an investigatory proceeding be instituted pursuant to Section 403 of the Communications Act of 1934, as amended, for the purposes aforesaid, and that inquiry be made to determine the policies and practices pursued by the networks and others in the acquisition, ownership, production, distribution, selection, sale and licensing of programs for television exhibition, and the reasons and necessity in the public interest for said policies and practices, including the following:

(a) the extent, if any, to which networks or others seek to achieve, or have achieved, control of television programming;

(b) the extent to which network ownership or control of programs for television exhibition is necessary or desirable in the public interest;

(c) the extent, if any, to which networks exclude or seek to exclude programs not owned or controlled by them or in which they have not acquired a financial or proprietary interest from access to network television markets;

(d) the extent, if any, to which networks demand or require financial or proprietary interest in inde-

pendently produced programs as a condition precedent to consideration for exhibition, or to exhibition, of such programs on the television networks;

(e) the participation of networks or persons owned or controlled by networks in the acquisition, ownership, production, distribution, selection, sale and licensing of programs for television syndication or non-network television exhibition.

It is Further Ordered, That for the purposes of said investigation proceeding, Chief Hearing Examiner James D. Cunningham shall constitute a board within the meaning of Section 5(d) of the Communications Act of 1934, as amended, (47 U.S.C.A. 155(d)-) and shall convene, conduct and carry on said proceeding at such times and places as he shall determine will best facilitate the dispatch of the business of said proceeding and serve the ends of justice; shall preside over said investigatory proceeding, shall receive evidence, shall make a record thereof, and shall certify the said record to the Commission; and in connection with [fols. 20d-20e] the said investigatory proceeding the said James D. Cunningham is hereby authorized and empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence and require the production of books; papers, correspondence, memoranda and other records deemed relevant to the inquiry and to perform all other duties in connection therewith as authorized by law; and

"It is Further Ordered, That the said investigatory proceeding shall be a public proceeding except that the said presiding officer may order non-public sessions of the said investigatory proceeding where and to the extent that the public interest, the proper dispatch of the business of said proceeding, or the ends of justice will be served thereby."

Federal Communications Commission, Mary Jane Morris, Secretary.

Adopted: February 26, 1959.
Released: February 27, 1959.

[fol. 20f] PETITIONER'S EXHIBIT No. 2

FCC 59-168
69486
Public Notice

February 27, 1959

FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

INVESTIGATORY PROCEEDING IN CONNECTION WITH PROGRAM STUDY

Pursuant to Section 403 of the Communications Act of 1934, as amended, and other pertinent sections of the Act, the Commission has ordered that an investigatory proceeding be instituted and carried on concerning certain questions arising from practices alleged to be engaged in by the networks and others in the television program selection process, including "tying-in" of programs with network time and facilities, attempts to control programming, attempts to restrict or exclude independent programs from the television program market, and other related questions affecting the public interest.

The proceeding will be convened and carried on at such times and places as the public interest and the proper dispatch of business may require. James D. Cunningham, Chief Hearing Examiner of the Commission, will preside over the proceeding and will be assisted by counsel from the Broadcast Bureau in the conduct of the proceeding. The Department of Justice has offered to assist the Commission in any way that it properly can with respect to this matter, and the Commission has invited the Department to cooperate in the proceeding. The proceeding shall be public except that the presiding officer may order non-public sessions where and to the extent that the public interest, the proper dispatch of the business of the proceeding, or the ends of justice will be served.

In October 1957, the Commission's Network Study Staff submitted its Report on Network Broadcasting. For reasons stated therein, the Report did not include a study of programming, which was then under way. The Report recommended that the study be completed and a supple-

mental report issued on the subject. Since then, the Commission has been pursuing the study of television programming. As a part of that study, much information and data have been collected regarding the acquisition, production, ownership, selection, sale and distribution of television programs for network exhibition.

[fols. 20g-20h] Among the matters under consideration have been the practices of networks and others in connection with the network program selection process in television. In hearings before committees of Congress and elsewhere, allegations have been made that the networks, in some instances, tie the use of network time and facilities to programs owned or controlled by them or in which they have acquired a financial or proprietary interest and that this practice has resulted in the arbitrary exclusion from network exhibition of some independently produced programs which otherwise merited selection as network offerings. The Department of Justice has also made an inquiry in this field in connection with its responsibilities under the antitrust laws. Pursuant to an arrangement made in April 1958, the Department recently made available to the Commission certain information and data collected in its investigation.

The Commission has reviewed the information and data on this matter available from these sources and has decided that questions which may affect the public interest have been raised which require resolution. Generally, these questions are concerned with the policies and practices of the networks and others in connection with network television programs.

FCC

Adopted: February 26, 1959.

* * * * * * *

[fol. 20i] PETITIONER'S EXHIBIT No. 3

FCC 59-1136
80097

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

Docket No. 12782

In the Matter of STUDY OF RADIO AND TELEVISION NETWORK BROADCASTING

SUPPLEMENTAL ORDER FOR INVESTIGATORY PROCEEDING

At a session of the Federal Communications Commission held at its offices in Washington, D. C. on the 9th day of November, 1959;

Whereas, on February 26, 1959, after a substantial preliminary inquiry, the Commission by its Order (FCC 59-166) and Public Notice (FCC 59-168) directed that inquiry be made pursuant to Section 403 of the Communications Act of 1934, as amended, to determine, among other things, the policies and practices pursued by the network licensees and others in connection with the production, selection, licensing and supervision of programs for television exhibition and the effect of such policies and practices on the public interest, and that a public investigatory proceeding be instituted for that purpose; and

Whereas, pursuant to said Order, such inquiry is continuing and public hearings have been and will be held with regard to certain phases of the network television program selection process; and

Whereas, in the course of such inquiry and from other sources, information has been reported to the Commission which tends to show that certain practices have been carried on by broadcast licensees and employees of such broadcast licensees and other persons in connection with the selection, supervision and broadcast to the public of programs and other material, which practices appear to be contrary to the public interest; and

Whereas, under the Communications Act and the policies promulgated by the Commission thereunder, the selection,

supervision and broadcast to the public of programs and other material including advertising is the primary responsibility of the licensed broadcaster subject to the duty of such broadcaster so to exercise that responsibility as to serve the public interest in terms of the needs and interests of the community which such broadcaster is licensed to serve; and

[fol. 20j] Whereas, under the provisions of the Communications Act of 1934, the Commission is empowered and directed to grant applications for construction permits, station licenses and modifications or renewals thereof for radio and television broadcast stations only after the Commission has made a determination that the public interest, convenience or necessity will be served thereby and, in making such determination one of the relevant factors considered by the Commission includes the policies and practices pursued and carried on by the applicant in the exercise of his responsibility to select, supervise and broadcast programs and other material including advertising which meet the public interest and the needs and interests of the community served by such broadcaster; and

Whereas, this Commission has from time to time in its decisions and otherwise laid down certain general standards for the guidance of licensed broadcasters in the exercise of such responsibility, nevertheless, in view of recent information concerning certain program practices, it is desirable to review the extent of the Commission's authority in connection with programming, in the light of the censorship prohibitions of Section 326 and certain court decisions, to determine whether or not legislation should be recommended to the Congress; and

Whereas, such general standards have been recognized and accepted by networks, licensees and other components of the industry and have in their essentials been adopted and set forth in codes and rules of conduct issued by various groups within the industry; and

Whereas, such general standards include such concepts as decency, propriety, fairness and balance in connection with the presentation of broadcast material to the public; and

Whereas, many or most of such standards were laid down

by the Commission prior to the advent and development of television broadcasting; and

Whereas, the rapid development and expansion of television network broadcasting has had a direct and important impact on radio broadcasting and has, in large measure, altered and changed the nature and character of the policies and practices pursued by many radio broadcasters affecting the type and content of programs and other material broadcast to the public and has also affected the use of radio as an advertising medium; and

Whereas, coincident with the expansion and development of television there has been a large increase in the number of licensed radio and television broadcasters which has greatly increased and complicated the problem of proper and adequate review by the Commission of the policies and practices pursued by its broadcast licensees; and

Whereas, in view of the foregoing, and in order to enable it properly to exercise its duties and responsibilities in connection with the program and advertising material broadcast to the public through the facilities of licensed broadcasters, the Commission has determined that inquiry should [fol. 20k] be made and that information and data should be obtained regarding the policies and practices pursued by radio and television licensees and others affecting the program and other material broadcast to the public:

Now Therefore, It Is Ordered that the inquiry and investigatory proceeding instituted pursuant to the Commission's Order of February 26, 1959, (FCC 59-166) be and is hereby amended and enlarged to determine the policies, practices, mechanics and surveillance pursued and carried out by networks, station licensees and others in connection with the acquisition, ownership, production, distribution, selection, sale and licensing of programs for radio and television exhibition and the policies and practices pursued by networks, station licensees and others in connection with the selection, presentation and supervision of advertising material for broadcast to the public and the reasons and necessity in the public interest for said policies and practices, and that in such inquiry information and data be obtained relevant to the following questions:

1. whether and the extent to which policies and practices being pursued by some broadcast licensees in

the field of programming and advertising are inimical to the public interest;

2. whether and the extent to which the general standards heretofore laid down by the Commission for the guidance of broadcast licensees in the selection and broadcast of programs and other material to the public are adequate in view of the changed and changing conditions in the broadcast industry;

3. whether and the extent to which the Commission should, by the exercise of its rule-making power, set out more detailed and precise standards for the guidance of broadcasters in the exercise of their responsibility;

4. whether and the extent to which the Commission's present policies and procedures in the review and consideration of the performance of its broadcast licensees in the field of programming and advertising is adequate, in view of the greatly increased number of such licensees; and

5. whether the Commission's authority under the Communications Act of 1934, as amended, is adequate for these purposes or whether legislation should be recommended to the Congress.

Federal Communications Commission, Mary Jane Morris, Secretary.

Released: November 10, 1959.

[fol. 201] PETITIONER'S EXHIBIT No. 4

Vol. 29

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE FEDERAL COMMUNICATION COMMISSION AT LOS ANGELES, CALIFORNIA

October 21, 1960

Docket No. 12782

In the Matter of STUDY OF RADIO AND TELEVISION NETWORK BROADCASTING

Contained herein are only those pages of Vol. 29 which pertain to the testimony of Taft Schreiber.

* * * * * * *

[fol. 20m] Whereupon, TAFT SCHREIBER, having been first duly sworn, was examined and testified, as follows:

[fol. 20n] Direct Examination.

* * * * * * *

[fol. 20o] By Mr. Bryant:

Q. Now, Mr. Schreiber, what is the premises 9370 Santa Monica Boulevard, Beverly Hills, California?

A. The headquarters of MCA.

Q. I see.

Now, have you, sir, in accordance with this subpoena, the directions contained in this subpoena, produced the matter referred to under paragraph marked capital (A) in the "Annex"

[fol. 20p] A. Yes, I believe we have that information for you.

Q. May I have it, sir?

(The Document Referred to Was Marked Exhibit LA 240 for Identification.)

By Mr. Bryant:

Q. Now, Mr. Schreiber, I show you, or you have before you another copy, a matter now marked—a two-page document now marked Exhibit LA 240 for identification.

Now, does this document, sir, contain all of the information called for in paragraph A of the Annex to the subpoena?

A. I believe that it does, yes.

Q. Well, do you know that it does, sir?

A. Well—

Q. Or have you been advised?

A. I have been advised that it does.

Q. I see. Thank you.

Mr. Bryant: May it please your Honor, I now offer as an exhibit in evidence a two-page document produced by Mr. Schreiber, pursuant to paragraph A of the Annex to the subpoena just read in the record, as an exhibit in evidence in this record.

Chief Hearing Examiner: It will be received in evidence.

• • • • • • •

[fol. 20q] Q. Now, Mr. Schreiber, will you direct your attention to paragraph B on the Annex attached to the subpoena now Exhibit LA 239 in evidence, and tell me whether you have produced here this morning the information called for in that paragraph marked B?

A. We have that information. However, we only will offer——

Q. Just a moment.

You do have the information with you, is that correct, sir?

A. Yes.

Q. Well, will you now produce the information, sir?

A. We will be happy to produce it on the basis of its being kept confidential.

Q. I ask you again, sir, will you produce the information for us here now as called for by the subpoena?

[fol. 20r] A. I respectfully submit that we cannot produce confidential information for this record.

Q. Well, now, is it your contention, sir, that the informa-

tion called for in subparagraph B of the Annex is confidential, is that it?

A. Yes, sir.

Q. Well, will you tell us, Mr. Schreiber—are you familiar with the testimony given here yesterday by the representatives of the William Morris Agency?

A. Just by hearsay.

Q. I see. Well, generally, will you tell us why, if you wish to do so—why this information called for in subparagraph B is, in your judgment, confidential information?

A. Well, this relates to personal relationships, agency relationships with the client. It is confidential in that these are matters really belonging to principals other than ourselves.

And we think that we, in effect, would be not only violating that fiduciary, but at the same time making available information that might be used detrimentally; it would be possibly advantageous to our competitors and people who might welcome that information.

And it has never been generally given.

It has been the policy of our company not to give this [fol. 20s] information. And it has been a policy for many years.

Q. Does that adequately state your position, sir?

A. Yes.

Q. Now, may I call your attention, sir, to be sure that we are discussing the same thing here—this subpoena calls simply for a list of the programs.

You are aware of that, sir?

A. Yes, sir.

Q. And, basically, those programs, translating this out of legalese into words that perhaps we can all understand—this, generally speaking—did you take in reading this, or were you advised, that this meant generally the programs in which you act as packager or selling agent; is that correct?

A. Yes.

Q. I see.

And it is your position that you should not be required publicly to disclose even the names of these programs?

A. Yes, sir.

Q. This category?

A. Yes, sir.

Q. Is there anything further you wish to say in this regard?

A. We would like to help the Commission in this regard, and feel that giving the Commission this information in [fol. 20t] confidence should serve its purpose.

We don't think, however, that it should be made a part of a public record that would therefore be available to people who otherwise could not have this information.

Q. Then, if I understand it, your position is that you are ready to supply the Commission in this proceeding with this information, but you do not wish to do so in a public context, is that correct?

A. That might be interpreted various ways. I would rather state it in my own language, and that is that if the Commission will take this information and assure us that it will be held in confidence, will not be published, and will not be made available to other people, other than those on the Commission, and that serve the Commission, we are very happy to give this to the Commission.

Q. Well, perhaps we had better define this a little further.

In other words, you would be limiting this simply to the Commission and its employees, is that the case? You said the Commission or those who serve the Commission.

Would you care to consult with your counsel?

A. Yes.

Mr. Bryant: May the witness consult with his counsel?

Chief Hearing Examiner: Yes.

By Mr. Bryant:

[fol. 20u] Q. You have consulted your counsel. Would you care to have the question read, or do you have it in mind?

A. I have it in mind.

Q. Yes, sir. Then would you give me your answer, please?

A. On advice of counsel, I would prefer—we do not want to offer this to the Commission unless, as I say, it is kept confidential—primarily because we believe that this information and these facts that you request are really outside of the operation of this hearing.

Q. Well, I understood you to say that, sir. What was the

last—that the facts are outside of the operation of the hearing—were those your words?

A. Yes, sir.

Q. Now, I still am not clear, sir, and I think the record should be clear on this, because this problem has been raised, as you may know, in other contexts, in other proceedings.

When you say "confidential," what is it that you are asking that we agree to do with regard to holding the matter confidential?

A. May I consult?

Mr. Susman: Just a moment, Mr. Schreiber. I would like to be heard on this.

Chief Hearing Examiner: I am sorry, sir. The ground [fol. 20v] rules, as you may or may not be aware of—

Mr. Susman: I am aware of what has transpired with counsel in this proceeding, your Honor, but I don't quite agree with the concept of what the ground rules are. But, be that as it may, I think we are getting into an area now where Mr. Schreiber, who is not a lawyer, is not really in a position to be answering questions of this nature.

Chief Hearing Examiner: I am sorry. I believe I cannot hear you at all. Will you strike counsel's—

Mr. Bryant: Would it help if I—

Chief Hearing Examiner: Strike counsel's statement from the record.

• • • • • • • •

[fol. 20w] The Witness: May I make a statement?

Chief Hearing Examiner: Let the witness make a statement.

The Witness: I came to this hearing with the expectations that I would testify on those subjects that were properly a matter of Commission interest and within the Commission's scope, authority and responsibility.

Mr. Bryant: Could you keep your voice up a little bit, Mr. Schreiber?

The Witness: And which, of course, would not require the public disclosure of trade secrets and confidential data of my company which might be of aid to its many competitors in this highly competitive television industry.

[fol. 20x] I am a businessman and one, incidentally, who has every faith and confidence in the American principle of free enterprise. I am not a lawyer. I am not a lawyer. I do not profess to be an expert about legal matters. The course that the interrogation has taken during the past two weeks has made it abundantly clear to me and I presume to all disinterested observers that one of the primary purposes of these hearings has been to question and perhaps criticize the business practices of the television production business.

* * * * * * *

Lawyers and witnesses have been told in these hearings that before an attorney may so much as talk to his client, the client must ask the Hearing Examiner's permission to [fol. 20y] speak with his lawyer. Now, no lawyer can function effectively as a lawyer under these circumstances. I vigorously and completely disagree with the ground rules of this kind. In my judgment, such ground rules deprive me and my company of the right to be accompanied, represented and advised by counsel. And I therefore respectfully decline to proceed further as a witness under the duress of such rules.

Mr. Bryant: Does that complete your statement, sir?

The Witness: Yes, sir.

Chief Hearing Examiner: Just a minute. I direct you to return to the stand.

The Witness: I decline to return unless these ground rules are changed so that I can be effectively represented by my attorney.

Chief Hearing Examiner: The ground rules will continue. There is no doubt in my mind as to their validity. The Commission concurs in that view.

Now, I direct the witness to return to the witness stand and answer whatever questions counsel may have relative to this proceeding.

The Witness: I decline.

Chief Hearing Examiner: Very well, sir. The record will show your position.

(The witness left the stand.)

* * * * * * *

[fol. 20z] PETITIONER'S EXHIBIT No. 5

97052

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C.

Docket No. 12782

In the Matter of STUDY OF RADIO AND TELEVISION NETWORK BROADCASTING

MEMORANDUM OPINION

By Chief Hearing Examiner James D. Cunningham, Presiding Officer:

1. Pursuant to the Commission's orders of February 26 and November 10, 1959, public sessions of this investigatory proceeding were convened in Los Angeles, California, on October 10, 1960, and were held from day to day through October 25, 1960. At the outset of these sessions, the Presiding Officer made the following announcement as to procedures:

> "The full authority of the Commission, within the limits of its order, has been delegated to me as presiding officer herein, pursuant to Section 5(d) of the Communications Act. Subject only to review by the Commission in certain instances, for purposes of this proceeding the presiding officer is clothed with the full powers of the Commission itself. Additionally, I should point out that, notwithstanding some similarity in procedure, this procedure is not a hearing in the usual sense, that is, it is not judicial in nature, but, as indicated, it is investigatory or fact finding. There are no parties, as such, and the procedural rules usual to quasi-judicial administrative cases do not apply in their entirety. In other words, the objective of this proceeding is to ascertain facts and make an official record thereof for use by the Commission in performing its functions under the Communications Act. Those who give testimony appear as witnesses for the Commission. Counsel will request their appearances, or if

necessary, they will be summoned to appear by process issued by the presiding officer. While no persons, other than the Commission representatives, may directly participate in the proceeding, any witness will of course be permitted to be accompanied by and to consult with counsel if he so desires. Any other person who has evidence or believes that he can supply information or data bearing upon the matters set forth in the Commission's orders may contact counsel, who will make the initial decision as to whether to call such person [fol. 20aa] as a witness, and whether the information and data offered by him may appropriately be included in the record. It is also permissible that such persons may make application in writing directly to me as presiding officer, as it is my function to determine within the limits of my authority under the Commission's orders what information and data may be included in the record of this proceeding."

2. It is appropriate to observe that the Presiding Officer appointed herein is authorized and directed to sit as a board of the Commission under Section 5(d) of the Communications Act of 1934, as amended. As such, he is empowered to convene, conduct and carry on sessions of this proceeding at such times and places as he shall determine will best facilitate the dispatch of the business of said proceeding and serve the ends of justice; to receive evidence, make a record thereof and certify same to the Commission; to administer oaths and affirmations, subpoena witnesses, and require the production of books, papers, documents, correspondence, memoranda and other records deemed relevant to the inquiry; and to perform all other duties and functions in connection therewith as authorized by law. The Commission's order is that the proceeding shall be public, except that the Presiding Officer may authorize nonpublic sessions where and to the extent that the public interest, the proper dispatch of the business of the proceeding, or the ends of justice will be served thereby.

3. The governing procedures aforementioned are similar to those originally set out by the Presiding Officer at the opening of the proceeding in Washington, D. C., on May 4, 1959, and adhered to consistently at all public sessions of

the inquiry. Witnesses have been permitted, indeed encouraged, to be accompanied, represented, and advised by counsel of their own choosing at all stages of the proceeding. The Presiding Officer has uniformly permitted witnesses, upon their request, to interrupt interrogations by Commission's counsel and to consult with and obtain the advice and guidance of their legal representatives.

MCA, Inc. and Taft Schreiber

4. On October 17, 1960, the Presiding Officer issued a subpoena duces tecum directed to Taft Schreiber, Vice-President of MCA, Inc., commanding him to appear and produce certain documents described in an Annex attached to and incorporated in said subpoena. It was returnable before the Presiding Officer on the 21st day of October 1960, and duly served. Schreiber appeared and was sworn as a witness. Upon demand, he produced part of the documentary material required by the subpoena but failed and [fol. 20bb] refused to produce a list of the programs of which MCA, Inc., is "packager" (more particularly described in Annex B of the subpoena). Although he clearly understood what was sought of him and was in possession of the required document, he refused to produce the list unless the Commission agreed to accept it as "confidential." When counsel for the Commission sought to elicit, by questions, the precise terms on which such information was offered, counsel for Schreiber interrupted the proceeding and demanded the right "to be heard." He was informed by the Presiding Officer that he could not be heard under the procedure laid down for the conduct of the proceeding. Notwithstanding this, counsel continued to interrupt the interrogations by counsel for the Commission, urging that he did not "agree with the concept of what the ground rules are." He was then informed that he was at liberty, within established procedures, to "consult with his client on the stand at any time . . ." At the suggestion of Commission counsel, the proceeding was then recessed for a short period to afford the witness an opportunity to consult. When the proceedings were resumed, counsel again asserted his "right" to "make a record in this matter." The Presiding Officer then advised:

> "You have a right to make a record through your client. This is not an adjudicatory proceeding. It is

investigatory. I will not hear argument or objections from counsel. The witness is at liberty to refuse for any reason you advise to answer any questions propounded here. I shall not hear you."

The witness was then permitted to make a statement to the effect that he was being denied the right of counsel, and that he was declining to continue as a witness "unles these ground rules are changed so that I can be effectively represented by my attorney." The Presiding Officer announced that the ground rules would continue in effect and directed the witness to return to the stand and answer whatever questions might be propounded on relevant matters. He declined to obey and left the hearing.

5. Thus, the witness acted in complete defiance of Commission authority. As stated upon the record by the Presiding Officer "There is no doubt about the relevance of this matter" and "the information should have been forthcoming." As to the contention that the data called for in Annex B of the subpoena should be held "confidential," such contention is found to be without merit.

[fol. 20cc] Motion to Quash Subpoenas

6. On October 18, 1960, the Presiding Officer issued subpoenas duces tecum to Promotions Unlimited and Dick Fishell & Associates, and subpoenas ad testificandum to Dick Fishell, Mary Rothschild and Betty Langley, which required their appearance in the hearing on October 24, 1960. They appeared in person and their counsel was permitted to move orally to quash the subpoenas. He asserted generally the following: That the documents required and the indicated areas of questioning were "outside the scope of the investigation . . . authorized by the Federal Communications Commission in its order of February 26, 1959 and its supplemental order of November 10, 1959"; that under the "ground rules" of the proceeding, the participation allowed counsel denies "due process of law" to the witness and does not comply with the requirements of the provisions of the Administrative Procedures Act requiring that a "witness be entitled to be accompanied, represented and advised" by counsel; that the information sought to be elicited as "confidential" in nature and should be accorded a "cloak of privilege"; and that the duces tecum subpoenas

were vague and indefinite. The motion was opposed by counsel for the Commission. After oral argument, the Presiding Officer denied the motion as to all of the witnesses. He held:

"The scope of this non-adjudicatory inquiry is necessarily broad.

"The Commission's obvious intention is that there shall be elicited here, in this proceeding, among other things, any and all facts and matters which appear to relate even remotely to promotion, publicity, advertising, or public relations by means of or through the use of broadcast matter.

"As I understand it, these are precisely the matters which are sought to be obtained from the several persons here under subpoena and whose subpoenas are sought by motion to be quashed.

"On the basis of the testimony of such persons, and the documents they would submit, the Commission will then be in a position to determine whether it should, in the public interest, adopt appropriate regulations or to request Congress for additional legislation.

"The Commission has the obligation to determine in detail the process by which radio and television programs are gotten together, all of the components in this behalf.

"Accordingly, my opinion is that the factual matters to be obtained from these five persons under subpoena and the others who could not be served, whose subpoenas are now sought to be quashed, are not only within the scope of the inquiry, and relevant to it, but in my judgment our record would be wholly deficient without this information.

[fol. 20dd] "Now, with regard to the question raised by counsel as to the ground rules, that the ground rules governing the course of the proceeding are invalid, let me repeat that there is no doubt in my mind as to their validity. Had there been any doubt, I would never have put them into effect on the tenth of October here. Nor has any witness, to my knowledge, been deprived here of the advice of counsel while he or she was on the witness stand. Actually, under these ground rules, witnesses were not only

permitted but indeed encouraged from time to time, by counsel for the Commission, and by myself, to consult with their counsel before answering—except in one instance when it was obvious that the question propounded was such that it would have been inappropriate to permit consultation with counsel.

"Accordingly, when these witnesses now under subpoena sought to be quashed appear on the witness stand, and, as in the case of Mr. Schreiber, of the Music Corporation of America, sooner or later they will so appear, the same ground rules will prevail, and their testimony and all pertinent data in their possession will be made part of this record.

"I find no merit in the contentions of counsel that the information sought in these subpoenas must be held confidential because of its competitive nature, nor that the subpoenas lack specificity. I think it is clear what documents the Commission is seeking. There is no doubt in my mind but what the persons under subpoena are fully aware of what those documents are.

"I am aware of nothing of a confidential nature in the matters sought to be elicited from any of these persons which would require that their testimony be made part of the non-public docket."

Each of the persons so subpoened was then duly sworn and each declined, on the advice of counsel, to testify in the proceeding.

7. There are pending with the Commission applications for review of the rulings aforementioned filed on behalf of MCA, Inc., Taft Schreiber, Dick Fishell & Associates, Mary Rothschild, Promotions Unlimited, and Betty Langley.

8. The rulings, orders and directions of the Presiding Officer referred to herein were valid and proper when made and they are hereby specifically affirmed. The testimony and data sought from the persons under subpoena herein are relevant to the inquiry and essential to the carrying out of the orders, directions and purposes of the Commission, as set forth in its orders of February 26 and Novem-

ber 10, 1959, *supra.* The unwarranted and unlawful refusal [fol. 20ee] of the said witnesses to testify and to produce information and data in response to lawful subpoenas and the proper direction of the Commission, acting through its Presiding Officer, constitutes contumacy and tends to frustrate this inquiry.

Accordingly, it is proposed:

That the Commission order the persons aforementioned, and each of them, to appear before the Presiding Officer, at a time and place to be designated by him, and to testify regarding all matters deemed relevant to this inquiry, as may be directed, and to produce all of the information and data required by the said subpoenas and such other relevant information and data as may be ordered or directed by the said Presiding Officer; and that the Commission further order that, in the event that the said persons, or any of them, shall fail to appear as directed, or, having appeared, shall fail to testify and produce the information and data required herein, an action be filed forthwith in the United States District Court to enforce the said subpoenas and the provisions of the Commission's order.

James D. Cunningham, Chief Hearing Examiner, Presiding Officer, Federal Communications Commission.

Dated: November 25, 1960
Released: November 28, 1960

[fol. 20ff] PETITIONER'S EXHIBIT No. 6

Vol. XXXIV

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION AT LOS ANGELES, CALIFORNIA

Thursday, March 9, 1961

Docket No. 12782

In the Matter of: STUDY OF RADIO AND TELEVISION NETWORK BROADCASTING

* * * * * * *

[fol. 20ff (1)] Chief Hearing Examiner: All right, Mr. Reporter, I think we can go on the record now.

The motion under consideration is that the subpoena previously served upon Taft B. Schreiber and MCA, insofar as it calls for the production of documents, be quashed, and, in any event so limited that Item [b] thereof is to have no force or effect.

It is also moved that the subpoena be quashed insofar as it calls for the personnel appearance of Taft B. Schreiber.

The motion further provides that in the event the subpoena should not be quashed, then, pending the outcome of the enforcement proceeding to be instituted in court under Section 409 [g] of the Communications Act of 1934, as amended, the testimony of Mr. Schreiber be taken as an interim matter on a confidential basis and held in a non-public docket. If in the enforcement proceeding the United States District Court, or the courts, should rule adversely to MCA and Mr. Schreiber, then the record shall be unsealed and made available for public inspection.

It appears that the motion contemplates a suspension of the so-called ground rules insofar as they pertain to the procedures for the interrogation of witnesses. This would be true under the proposal of the motion whether the sessions be public or private.

[fol. 20gg] I have reviewed the subpoenas, which I issued

last October, and I find they are valid in every detail. They call for the production of data and testimony relative thereto which are not only relevant to the proceeding but are essential to the success of the investigation.

I think the question of the authority of the Commission to inquire of MCA and Taft Schreiber is pretty firmly established by now. MCA, among other things, according to this record, is engaged in the production, creation, sale, distribution, syndication and packaging of programs for television exhibitions. Accordingly it would seem to me that this organization is no less a part of the broadcast industry of the nation than are the broadcast licensees themselves, who are the actual exhibitors of the programs produced by MCA in many instances.

Let me say next that under the ground rules which I laid down early in the proceeding none of the witnesses whose testimony is now a part of the record have been deprived of the effective right to counsel. The transcript of the record itself amply demonstrates this fact in my judgment. I must reject as unmeritorious the contention of counsel to the contrary.

As has been declared here many times by counsel, and by the Commission itself in its order, this is not an adjudicatory proceeding within the meaning of the Administrative Procedures Act of 1946, it is investigatory and purely fact finding, and in my judgment far greater representation by counsel for the witnesses has been permitted than is re- [fol. 20hh] quired by law. The Commission itself, in its opinion released January 27 last, upheld the methods followed by the Presiding Officer in regard to the participation of counsel for the witnesses.

The motion asks for all practical purposes that the Presiding Officer review, reverse and set aside his numerous rulings, directions, and orders made in our October sessions pertaining to Mr. Schreiber and MCA, although the Commission in its January 27 opinion has upheld as valid all of these rulings, directions, and orders.

I have, nevertheless, considered the motion on the merits. As I have indicated, the authority of the Commission to make this inquiry is clearly beyond question. As suggested or urged by Mr. Bryant, there is here sought in behalf of Mr. Schreiber and MCA special treatment not accorded the

numerous other witnesses who heretofore gave testimony in the proceeding. No legal reason has been presented here why such special treatment be permitted.

MCA is engaged in the business of producing and packaging of programs for exhibition on television, as I mentioned a moment ago, and it is essential to the investigation that these matters be presented into the record.

It seems to me that the Presiding Officer is under a mandate from the Commission to hold public sessions. This is clear from its language on page 2 of its memorandum opinion and order of January 27. I think I might include [fol. 20ii] in my ruling the language of the Commission in that regard:

"It was the intention of the Commission in issuing both of the above orders"—namely, the original order of February 27, 1959 and the subsequent order of November 10, 1959—"to institute a broad and comprehensive inquiry to establish a public record of the relevant policies, practices, facts and circumstances involved in the production, creation, selection, sale, licensing and exhibition of programs broadcast through the facilities of its licensees. Although the Commission empowered the Presiding Officer to accept evidence, information and data on a non-public basis, it was the Commission's express intent that the proceedings be public and that the record be available to the public, station licensees, the broadcast industry, to the Commission and to Congress.

"We think it clear that all of such groups have a proper interest in the complex and general unknown processes involved in the production, sale, distribution, etc., of broadcasting programming, and more particularly, in the factual basis for any action—legislative, rule-making or licensing—which the Commission may take as a result of its inquiry into these matters. Moreover, the policies and practices into which inquiry is and has been made herein, involve many-sided transactions between diverse and partially competitive, but also partially complementary, components and members of the same industry, such as networks, adver- [fol. 20jj] tising agencies, program producers, program packages, talent agencies, etc.

"If we are to obtain a full and rounded picture of such transactions, it is highly desirable that the facts, informa-

tion, data and opinions applied by one group or individual be known to other groups and individuals involved, so that they may verify, refute, explain, amplify or supplement the record from their own diverse points of view.

"In our view, a public investigatory hearing is the most effective means to this end. For these reasons, among others, we determined that public proceedings should be the rule herein, and that non-public procedures should be used only in those extraordinary instances where disclosure would irreparably damage private, competitive interests and where such interests would be found by the Presiding Officer to outweigh the paramount interest of the public and the Commission in full public disclosure."

I might point out that, whatever private competitive interests are asserted here, certainly they must be subordinated to the public interest and the interests of the Commission in securing the full facts.

[fol. 20kk] I therefore cannot rule that the proceeding be held in executive session and the record be sealed until a ruling by the Court on litigation expected to be instituted as to the legality of the procedures and the subpoenas herein.

I think I have covered all of the major points. This motion was joined in by Mr. Schwab in behalf of Dick Fishell, Betty Langley, Mary Rothschild, Dick Fishell & Associates, and Promotions, Unlimited. It is denied, of course, with reference to them, with reference to MCA, Inc. and with reference to Taft Schreiber.

Mr. Susman: May I be heard at this point, Mr. Examiner?

Chief Hearing Examiner: Very well, sir. Briefly, if you will.

Mr. Susman: I am not quite sure of the procedure at this juncture, but I did want to make this statement, that the decision that you have just rendered makes it imperative in our judgment in order that the meritorious legal position of my clients be preserved that MCA and Mr. Schreiber not answer any further questions in this proceeding pending decision by the Courts under Section 409[g] as to the matters in issue.

I repeat that my clients are willing to enter into all reasonable stipulations with the Commission to extend the

utmost cooperation to the Commission in obtaining an expeditious decision by the Courts under that section with [fol. 50ll] respect to these matters in issue.

Chief Hearing Examiner: I will have to call Mr. Schreiber to the stand to be sworn.

* * * * * * *

[fol. 50mm] TAFT SCHREIBER, having been first duly sworn, was examined and testified as follows:

The Witness: Mr. Cunningham, may I make a statement?

Chief Hearing Examiner: If you would.

The Witness: Mr. Cunningham, Your Honor, Mr. Bryant, for the reasons stated in the petition and motion that was filed in my behalf, and in behalf of my company, and [fol. 50nn] upon advice of counsel I cannot and will not answer any questions in this regard, and not until the Court acts upon the propriety of this position will I give answer to any of these statements.

* * * * * * *

[fol. 20oo] Direct Examination.

By Mr. Bryant:

* * * * * * *

Q. Have you been sworn again, sir?

A. Just a minute ago.

Q. Oh, I beg your pardon. I must have been looking another way.

Now, you are an officer, are you not, sir, of MCA, Inc?

A. Mr. Bryant, may I just speak to my counsel?

Chief Hearing Examiner: Certainly, at any time you wish, Mr. Schreiber.

[fol. 20pp] A. As previously stated, Your Honor and Mr. Bryant, I respectfully refuse to answer any questions.

Chief Hearing Examiner: I must direct, Mr. Schreiber, that you answer the question put by Counsel for the Commission.

Mr. Bryant: I submit, sir, that this is a very relevant question and that it is wholly within the Commission's Order.

Chief Hearing Examiner: The witness has a direction, Mr. Bryant, to answer the question.

Mr. Bryant: Thank you, sir.

By Mr. Bryant:

Q. What is your position with MCA, Incorporated, Mr. Schreiber? Are you—Excuse me.

Chief Hearing Examiner: The witness is directed to answer the question.

By Mr. Bryant:

Q. In what business or businesses, sir, is MCA, Incorporated, or Inc., engaged?

Chief Hearing Examiner: The witness is directed to answer the question.

By Mr. Bryant:

Q. What, sir, are your duties at MCA, Incorporated?

Chief Hearing Examiner: Would you like to give the witness time to reflect after you have directed your answer?

The Witness: Your Honor, I am not going to change my [fol. 20qq] position.

* * * * * * *

[fol. 20rr] Mr. Bryant: In view of the witness' statement that he flatly refuses to answer any questions, sir, I see no point in my continuing. The witness is on the stand, he has been duly sworn; he should not be excused, in my judgment, until he does answer the questions. But we are just here on a dumb show, and I assume in that context we ought to simply suspend the proceeding.

Chief Hearing Examiner: Is that your motion?

Mr. Bryant: With the witness on the stand.

Chief Hearing Examiner: Is that your motion, sir?

Mr. Bryant: That is, sir.

Chief Hearing Examiner: I'm inclined not to excuse the

witness, Mr. Susman. I have to ask that appropriate proceedings be instituted in the United States District Court to compel compliance with these subpoenas.

Meanwhile Mr. Schreiber will remain and consider himself under the subpoena which has been served upon him.

Do you have another motion, Mr. Bryant?

Mr. Bryant: Simply that we suspend these proceedings. If Mr. Schreiber is going to continue to refuse to answer the questions, as he has stated, I see no purpose in physically standing here and asking question into thin air.

Chief Hearing Examiner: I wanted him to be given the full opportunity, and for that reason I ordered you to interrogate him as you did. The record is now complete, I believe. He has been interrogated on preliminary matters; [fol. 20ss] he refused to testify, on the advice of his counsel.

I believe his counsel desires to have the matter litigated. I have instructed that appropriate proceedings be instituted in the U. S. District Court to compel compliance with these subpoenas, and to compel the testimony of Mr. Schreiber.

* * * * * * *

[fol. 20tt] Chief Hearing Examiner: I see no reason why Mr. Schreiber should be held here any longer under these circumstances. He will continue to be under subpoena and will be subject to further order.

The Witness: Thank you, Mr. Cunningham.

* * * * * * *

[fol. 20uu] PETITIONERS EXHIBIT No. 10

Exhibit No. LA237

FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

September 20, 1960

Inter-Office Memorandum

To: Ashbrook P. Bryant, Chief Office of Network Study.
From: Francis T. Nolan, Attorney.
Subject: MCA Inc. (Music Corporation of America) All files at the Security and Exchange Commission.

In connection with the subject's registration of 400,000 shares of MCA, Inc. common stock, npv examination discloses three Dockets in connection therewith, namely:

2-15561-1-1
2-15561-1-2
1- 4243-1

These files pertain to the registration of the above referred to shares under the Securities Act of 1933 and the Securities Exchange Act of 1934. Attached to the registration statement (Form S-1) were certain exhibits hereinafter more fully described.

In view of the fact a copy of the original Form S-1 received by the SEC on September 8, 1959, and a copy of the Preliminary Prospectus (PP) dated September 8, 1959, were already in the files of this office, only such Amendments to Form S-1 and the later changes and additions in the prospectus will be covered herein.

Discussion with Mr. Dunn, Grouphead, handling the issue in the Corporation Finance Division of the SEC, did not disclose anything unusual in processing the registration statement. However, Mr. Dunn did comment that the short space of time between the date of registration of the Securities on October 8, 1959, and registration of the Securities on the NYSE on November 30, 1959, was unusual.

Topic

The Company

"Prior to the incorporation of the Company in Delaware on November 10, 1958, there were five main MCA companies related through common ownership and management;

[fol. 20vv] "Music Corporation of America"

"MCA TV, Ltd."
"Management Corporation of America"
"Revue Productions, Inc."
MCA TV, Ltd."

"Pursuant to a plan of reorganization effective September 1, 1959, each of the stockholders of Music Corporation of America; MCA Artists, Ltd.; Management Corporation of America, Revue Production, Inc.; MCA TV, Ltd., agreed to exchange a unit of one share of stock in each of these five corporations (or a total of five shares of common stock of one unit) for 142 shares of common stock in MCA, Inc. Holders of preferred stock in Music Corporation of America, MCA Artists, Ltd., and Management Corporation of America agreed to exchange their preferred stock in these Corporations for preferred stock of MCA, Inc., on a share for share basis. Management Corporation of America and Revue Productions, Inc. were merged into MCA, Inc. and the common stock of Management Corporation of America and Revue and the preferred stock of Management Corporations of America were cancelled. All of the outstanding common stock of Music Corporation of America, MCA Artists, Ltd.; and MCA TV, Ltd. is now held by MCA, Inc."

(Reg. State)

The status of the various MCA companies before and after the reorganization is summarized hereinunder:

"Company	Before Reorganization	After Reorganization
MCA Inc.	Independent Company	Parent
Music Corporation of America	Independent Parent	Subsidiary
MCA Artists, Ltd.	Independent Parent	Subsisiary
MCA TV, Ltd.	Independent Parent	Subsidiary
Revue Productions, Inc.	Independent Parent	Merged
Management Corporation of America	Independent Parent	Merged
11 United States Subsidiaries	Subsidiaries	Unchanged
2 Canadian Subsidiaries	Subsidiaries	Unchanged
12 Foreign Subsidiaries	Subsidiaries	Unchanged"

(Note: See PP, page 16 notes to financial statements)

HISTORY AND BUSINESS

Personnel

"In the firm belief that 'manpower' is the most important asset of the MCA companies, from the inception of the original MCA company in 1924, the MCA companies have endeavored and will continue every effort to provide security, protection and incentive for their executives and other employees." (Note: see page 5 of Prospectus)

[fol. 20ww] TELEVISION FILM PRODUCTION

"The Company is engaged in the production of television series and now owns approximately 1,657 television negatives which were produced or acquired by the Company. Certain of these television negatives are subject to outside profit participations.

"The Company is also engaged in the production of television film series with other producers and now has a co-ownership interest with such other producers in approximately 525 additional television negatives. These negatives are ones in which such other producers contributed certain creative efforts and the Company supplied all production facilities and financing. The Company's ownership interest in these negatives varies from series to series depending on the extent of the Company's creative contribution.

"The Company also makes production facilities and financing available to independent television producers on a cost plus fee basis.

"Revenues received by the Company from the production

of any one of the foregoing television series have not been substantial in relation to the total revenues received by the Company.

(Note: It should be noted that the original statement under this topic in the preliminary prospectus was eliminated and changed in the final Prospectus of October 8, 1959, to read as follows:

"The Company is engaged in the production of television film series and now owns approximately 1,657 television negatives, of which 100 are one-hour and 1,557 are one-half hour in length, which were produced or acquired by the Company. Substantially all of these television negatives have had either at least one exhibition on a national network or substantially equivalent exhibition on a national network or substantially equivalent exhibition in syndication.

"For the 1959-60 season, the Company has produced or is producing the following television programs: Coronado 9 (39 one-half hours); General Electric Theatre (23 one-half hour); Laramie (26 one-half hour); Mike Hammer (39 one-half hour); Staccoto (39 one-half hour); State Trooper (39 one-half hour); Wagon Train (37 one-half hour). Certain of these television negatives are subject to various outside profit participations, not in excess of 50%. In addition, the Company owns approximately 700 pre-1948 Paramount features. See Television Film Distribution.

"The Company is also engaged in the production of television film series with other producers and now has a co-ownership interest with such other producers in approximately 525 additional television negatives, of which 35 are one-hour and 490 are one-half hour in length. Substantially all of these television negatives have also had a least one exhibition on a national network or substantially equivalent [fol. 20xx] exhibition in syndication. For the 1959-60 season, the Company with other producers has produced or is producing the following television programs: Bachelor Father (39 one-half hour); Deputy (39 one-half hour); Johnny Midnight (39 one-half hour); Markham (39 one-half hour); M Squad (26 one-half hour); Riverboat (14 one hour); Shotgun Slade (39 one-half hour); Whispering Smith (26 one-half hour). These negatives are ones in which

other producers contribute certain creative efforts and the company supplied all production facilities and financing. The Company's ownership interest in these negatives varies from series to series, depending on the extent of the Company's creative contribution. The Company's ownership interest averages 50%.

"The Company also makes production facilities and financing available to independent television producers on a cost plus fee basis.

"Revenues received by the Company from any one television series are not substantial in relation to the total revenues received by the Company.

STUDIO FACILITIES

"In February 1959, the Company purchased for $11,250,000 the Universal-International Studios at Universal City, California, now operated by the Company as Revue Studios. The Company is currently constructing additional production facilities at the studio at a cost of approximately $4,000,000.

"A portion of the studio space and facilities has been leased to Universal Pictures Company, Inc. ('Universal') for a period of 10 years commencing February, 1959 at a minimum annual rental of $1,000,000. It is believed that the present studio space and facilities, together with the current new construction, will provide sufficient space and facilities to fulfill the Company's own present requirements for television production, to satisfy the Company's obligations to Universal under the lease, and to fulfill the requirements of other producers to whom the Company may make facilities available. (Prospectus)

ARTIST'S REPRESENTATION

"Music Corporation of America and MCA Artists, Ltd., wholly-owned subsidiaries of the Company, are engaged in the representation of artists in various branches of the entertainment business. The relationship between these companies as agents and the artists they represent as principals is governed by numerous guilds and unions. These guilds and unions specifically prescribe in their regulations the form of agency agreement, duties of the agents, and the

maximum rate of commissions. The artist employs the agent to render such prescribed duties, among which are to use all reasonable efforts to assist the artist in securing employment and to counsel and advise the artist in matters which concern only the professional interest of the artist in those branches of the entertainment industry in which the agent represents the artist. The agent has no power or authority to accept employment for the artist. The agent may only submit or recommend offers. The artist has the [fol. 20yy] sole right to reject or accept, or require other terms as a condition to his acceptance of employment. Substantially all the guilds and unions specifically provide in their regulations that the agent's right to represent the artist is subject to termination by the artist at will, with or without cause, and the agent's sole right in the event of termination without cause, is to receive commission as specifically limited by the artist's contract with the agent.

"Such regulations include the right to prohibit the agent from engaging in television production, and also include limitations on ownership in such activities. Although waivers have been received with respect to such prohibition and limitations, the Company makes no representation as to how long the waivers will be continued.

"Revenues received by Music Corporation of America and MCA Artists, Ltd. from any one artist represented by them have not been substantial in relation to the total revenues of such companies." (Preliminary Prospectus)

(Note: Special attention should be given to this topic in view of its reference to Guilds and Unions and their regulations, and failure to explain or describe the relationship between the Guilds or Unions to the subject company. Reference to waivers from the Guilds and Unions also referred to, is likewise unexplained.)

COMPETITION

"All the branches of the entertainment business in which the Company is engaged is highly competitive.

"The business of producing and distributing television film series is also very speculative. Television film series of the Company compete with television film series of many

other producers and distributors, including all of the national television networks, regional television networks, independent television stations, all of the major motion picture companies, independent motion picture and television companies, and motion picture features on television.

"The position in the industry of producers or distributors of television films, including the Company, can change materially from year to year and technical and scientific developments and economic changes in the fields of television production and broadcasting can bring about significant changes in the nature and conduct of the company's business. No representation is made as to present value or anticipated income from the negatives owned by the Company or whether any of such technical, scientific, or economic changes or developments would be either beneficial or detrimental to the Company.

"The business of representing artists is extremely speculative. A large number of firms and individuals are engaged in this business; therefore, the Company's business can decrease or increase in significant proportions at anytime. (Preliminary Prospectus)

[fol. 20zz] DESCRIPTION OF PROPERTIES

"The principal executive offices of the Company are located in leased premises at 598 Madison Avenue, New York City; 430 North Michigan Avenue, Chicago, Illinois; and 9370 Santa Monica Boulevard, Beverly Hills, California.

"The Company also rents space for additional offices and distribution and production facilities in various cities in the United States under leases for varying terms, including the Company's main distribution center at 17 East Hubbard Street, in Chicago, Illinois. The Company also rents space in foreign countries.

"The Company owns Revue Studios which covers approximately 370 acres and consists of additional executive offices, other offices, sound stages and all other necessary buildings and equipment necessary for the production activities described in History and Business. (Preliminary Prospectus)

[fol. 20aaa] SUBSIDIARIES OF REGISTRANT

"1. The Company owns directly or indirectly 100% of the voting securities of the following corporations whose earnings are included in consolidated financial statement:

Name of Company	State or Other Jurisdiction Under the Laws of which Organized
Music Corporation of America	Delaware
Music Corporation of America	Florida
MCA Artists, Ltd.	Delaware
MCA Artists Limited, Incorporated	Florida
MCA Artists (Canada) Ltd.	Canada
MCA TV Ltd.	California
MCA Canada Ltd. (Canada)	Canada
Sherry TV, Inc.	California
MCA Corporation	New York
EMKA Ltd.	Delaware
Alabama Productions Inc.	California
Alaska Music Co., Inc.	California
Arizona Productions Inc.	California
Hannibal* Productions Inc.	California
Hawaii Music Co. Inc.	California
Helena Productions Inc.	California

* On effective date of reorganization, name changed to Revue Productions, Inc.

"2. The Company owns directly or indirectly 100% of the voting securities of the following corporations whose earnings are not included in the consolidated financial statement. Separate financial statements are omitted since all of such subsidiaries considered in the aggregate as a single subsidiary would not constitute a significant subsidiary.

Music Corporation of America, Ltd.	England
MCA (London) Ltd.	England
Representation Linnit & Dunfee Ltd.	England
MCA (TV) England, Ltd.	England
MCA (England) Ltd.	England

MCA (Italy) spa.	Italy
MCA (Paris) Ltd.	France
CI-MU-RA	France
Administradora General S. A. de C. V.	Mexico
MCA TV (Mexico) S. A.	Mexico
MCA TV Television G.m.b.H.	Germany
MCA (Germany) G.m.b.H.	Germany

Franchises and Concessions—None (Registration Statement)

[fol. 20bbb] DIRECTORS AND OFFICERS

"Jules C. Stein*	Director and Chairman of the Board
Lew R. Wasserman*	Director, President, and Chief Executive Officer
Leigh M. Battson	Director
Lawrence Barnett	Vice President; President, Music Corporation of America
Albert A. Dorskind	Vice President and Treasurer
Walter M. Heyman	Director
Karl Kramer	Vice President
M. B. Lipsey	Vice President; President EMKA Ltd.
Charles Miller*	Director and Vice President
Herbert I. Rosenthal	Vice President; President, MCA Artists, Ltd.
Michael Rockford	Vice President
Morris M. Schrier	Vice President and Secretary
Taft B. Schreiber	Vice President; President, Revue Studies Division
David A. Werblin	Vice President; President, MCA TV, Ltd.

* Member, Executive Committee.

"Jules C. Stein, founder and chairman of the board of directors of the Company, served as president from 1924 until 1946. Thereafter until the present date Mr. Stein continued as chairman of the board and Lew R. Wasserman served as president of all the companies, (with the exception of Revue Productions, Inc., of which he was vice presi-

dent) until June 1958. In June 1958, Mr. Wasserman was elected chief executive officer and executive chairman of the board of the companies and at the same time, five of the above senior executives were elected presidents.

"All of the above executive officers have been actively engaged in the business of the Company for the past 20 years, except Mr. Dorskind for whom the period is six years.

"Leigh M. Battson is a director of the Union Oil Company of California and Walter M. Heyman is a director and executive vice president of The First National Bank of Chicago.

"The total aggregate remuneration proposed to be paid the company directly or indirectly to Jules C. Stein and Lew R. Wasserman and the Company's officers as a group for services during the first full year of the Company's existence is as follows:

[fol. 20ccc]

Name of Individual or Identity of Group	Services Will be Rendered	Capacities in Which Aggregate Remuneration	Employer's Contribution to Profit-Sharing Fund(2)	Aggregate Amount Set Aside in Profit-Sharing Fund to Date(2)
Jules C. Stein	Chm. of Baord	$156,000	$15,000	$236,250.02
Lew R. Wasserman	President and Chief Exec. Officer	175,000	18,750	282,225.02
Officers as a Group		(1)	(1)	1,720,567.56

"(1) The Company will pay remuneration in excess of $30,000 to additional directors and officers during the first full fiscal year of the Company's existence but it is not feasible at this time to estimate what amounts will be paid to specific individuals other than Mr. Stein or Mr. Wasserman who will be paid the amounts set forth above. Messrs. Stein and Wasserman were paid aggregate remuneration, including bonuses, of $1,012,500 and $147,660 was contributed to the Profit Sharing Trusts for their benefit.

"(2) The Company does not have a profit sharing plan. The Profit Sharing Fund refers to separate profit sharing plans and trusts created and maintained by Music Corporation of America, MCA Artists, Ltd., and MCA TV, Ltd. covering all of amount based upon profits, but not in excess of 15% of the salaries and bonuses of eligible employees

PRINCIPAL STOCKHOLDERS

"The principal holders of the outstanding common stock of the Company are:

Name and Address	Type of Ownership	Number of Shares	Percent of Class
Jules C. Stein, 9370 Santa Monica Blvd., Beverly Hills, Cal.	Of Record and Beneficial	1,430,000	39.7
Lew R. Wasserman, 9370 Santa Monica Blvd., Beverly Hills, Cal.	Of Record and Beneficial	715,000	19.8
Directors and Officers as a Group	Of Record and Beneficial	3,065,920	85.2

"The outstanding 5% cumulative preferred stock of Music Corporation of America, MCA Artists, Ltd. and Management Corporation of America, was exchanged for previously unissued 5% cumulative preferred stock of the Company. Jules C. Stein and members of his family own either beneficially or of record 14,237.60 (79.1%) of this stock, which ownership or interests were originally acquired by them in 1948.

"Before the reorganization, the Company had outstanding 25,145 shares of its common stock which had been sold upon the incorporation of the Company for $20 cash per share and such stock was sold to the stockholders of the then existing MCA companies in the same proportions as their ownership in such companies. Jules C. Stein and Lew R. Wasserman, each of whom owns more than 10% of the common stock of the Company, purchased a total of 15,000 of such shares for $300,000 cash. Pursuant to the plan of reorganization they exchanged 59.5% of the total outstanding stock of the five MCA, —— ——.

[fol. 20ddd] CAPITAL STOCK

"The following is a summary of certain information concerning the common stock and the preferred stock:

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and these companies pay all expenses and the employees make no contributions. All officers of the Company are also covered under the plans as either officers or employees of one or more of these subsidiaries. (Preliminary Prospectus)

CLASSES OF STOCK

"The Company has two classes of authorized capital stock: common stock without par value and $100 par value; 5% cumulative preferred stock.

DIVIDENDS

"Dividends at the rate of 5% per annum cumulative are payable on the preferred stock before any dividends may be paid on the common stock. Thereafter, dividends may be paid at the discretion of the Board of Directors on the common stock out of 70% of the Company's earnings, after a sum equal to a full year's future dividends on the preferred stock has been declared and set aside.

LIQUIDATION

"In the event of liquidation, to the extent of the assets of the Company legally available for distribution, the preferred stock will first be paid $100 per share plus any acumulative dividends unpaid; the remaining assets will be distributed to the holders of the common stock.

CONVERSION AND PRE-EMPTIVE RIGHTS AND ASSESSMENTS

"Holders of the common stock have no conversion or pre-emptive rights. The outstanding common stock and preferred stock is, and the additional common stock to be issued and sold hereunder, will be fully paid and non-assessable.

VOTING RIGHTS

"Each holder of the common stock has one vote per share and at any election of directors has the right to cumulate his votes and give one candidate a number of votes equal to the number of directors to be elected multiplied by the number of votes to which his shares are entitled, or to distribute his votes among as many candidates as he thinks fit. The consent of not less than two-thirds of the shares of the preferred stock voting separately as a class is necessary to amend the Certificate of Incorporation so as to

affect adversely the rights or preference of the preferred stock." (Preliminary Prospectus)

CAPITALIZATION

"The capitalization of the Company as of September 1, 1959, and as adjusted to give effect to the issuance of the common stock offered hereby and the application of the proceeds thereof is as follows:

fol. 20eee]

	Amount Authorized	Amount Outstanding	
Common Stock, without par value	5,000,000 shs.	(1) 3,595,735	3,995,735
Preferred Stock, $100 Par Value 5% Cumulative	20,000 shs.	17,985	17,985
Notes Payable to Bank		9,250,000	3,000,000

(1) Includes 250,000 shares reserved for options under Company's Restricted Stock Option Plan. No options have been granted. See "Options to Purchase Securities."

(2) Reference is made to Note 9 to financial statements with reference to leases.

(Prospectus)

UNDERWRITIN

"In the Underwriting Agreement, subject to the terms and conditions therein set forth, the several Underwriters represented by Lehman Brothers, have severally agreed to purchase from the Company the number of shares of the Stock set forth below, and all such shares are to be purchased if any thereof are purchased:

Name	Address	Number of Shares
Lehman Brothers	1 William Street, New York 4, N.Y.	
	Total	380,000

"The Representative of the Underwriters has advised the Company that they propose to offer the Stock to the public initially at the public offering price set forth on the cover page hereof, and to certain dealers at such price less a concession not exceeding ....¢ per share. The Underwriters and such dealers may allow a discount not exceeding ....¢ per share on sales to other dealers. After the

initial offering, the public offering price and concessions may be changed by the Representative.

(Note: Attention is called to the fact that the above preliminary prospectus listed only Lehman Bros., as one of several underwriters for this issue. Actually, Lehman Bros. represented the following sub-underwriters:

"Lehman Bros.	N.Y.C.	$20,000
Ball, Burge & Kraus	Cleveland	5,000
A. G. Becker & Co., Inc.	Chicago	16,000
Blunt Ellis & Zimmons	Chicago	5,000
Blyth & Co., Inc.	N.Y.C.	32,000
Boettcher & Company	Denver	5,000
J. C. Bradford & Co.	Nashville	5,000
Burnham & Company	N.Y.C.	5,000
J. M. Dain & Co., Inc.	Minneapolis	5,000
The First Boston Corporation	N.Y.C.	32,000
Robert Garrett & Sons	Baltimore	5,000
Goldman, Sachs & Co.	N.Y.C.	32,000
Lazard Freres & Co.	N.Y.C.	32,000
[redacted], Wilber, Jackson & Curtis	N.Y.C.	16,000
[redacted]scher, Pierce & Co. Inc.	Dallas	5,000
Roberson and Co. Inc.	Philadelphia	5,000 (Amended
Dean Witter & Co.	San Francisco	32,000 Prospectus

[fol. 20fff] Note: Attention is called to the fact that Amendment No. 2 to Form S-1 discloses that the shares covered by the Registration Statement were offered to the public at $17.50 per share (7 million dollars total), with proceeds of $16.40 to the Company —($6,593,000).

Attention is likewise called to the statement in the application for registration of the securities on the N.Y. Stock Exchange which disclosed that the approximate number of each class of stock on completion of the public offering (based on distribution information purchased by underwriters):

Common Stock	3,828
———— Preferred Stock	— 24)

APPLICATION OF PROCEEDS

"The Company will apply $6,250,000 of the net proceeds from the sale of the stock to the reduction of the Company's short term bank indebtedness and the balance (after estimated expenses of this financing to be paid by the Company) will be added to the Company's working capital.

The short term bank indebtedness was incurred by the Company to finance the acquisition of and additions to production facilities at Revue Studios, Universal City, California. (See "History and Business." There is no assurance that additional bank borrowing may not be made in the future. (Prospectus)

LEGAL PROCEEDINGS

"Ordinary routine legal actions incident to the Company's business are pending against the company. In the company's view and that of its counsel, such proceedings are normally incident to the character of the business of the Company and are not likely to result in aggregate recoveries against the company in any material amount.

"In January, 1959, one of the company's then affiliates, Music Corporation of America, was requested by the United States Department of Justice to make its files available for examination in connection with an investigation of alleged violations of the Federal Anti-trust laws by talent agencies. Since that time, the Department of Justice has been investigating the company's activities and those of its prior affiliates, predecessors, and subsidiaries to determine whether there have been any such violations by the company or by such affiliates, predecessors, or subsidiaries. In the opinion of the company and its counsel, no such violations have existed or do exist."

(Note: Attention is called to the fact that the following paragraph did not appear in the preliminary prospectus:

"On September 14, 1959, the Musicians' Guild of America and various members of that organization filed a private anti-trust action in Los Angeles, California, against the American Federation of Musicians of the [fol. 20ggg] United States and Canada, Local 479, the Federation, various officials of the Federation, the three national television networks, and named numerous other defendents including Music Corporation of America and Revue Productions, Inc. The prayer of the complaint is for damages of $3,650,000 trebled for costs and attorney's fees and for various injunctions to terminate alleged employment discrimination. The proceeding is one of many controversies which exist

between two rival labor organizations and, in the opinion of the company and its counsel, has no merit insofar as the company is concerned."

LEGAL OPINIONS

"Messrs. Beilenson, Meyer, Rosenfeld, & Susman, Citizens National Bank Building, 9350 Wilshire Boulevard, Beverly Hills, California, who will act as counsel for the Company, will render an opinion as to the legality of the common stock offered hereby; and Messrs. Simpson Thacher & Bartlett, 120 Broadway, New York 5, New York, will act as counsel for the underwriters and will render an opinion to them as to the legality of the common stock."

EXHIBITS ATTACHED TO REGISTRATION STATEMENT

EXHIBIT 1

N.Y.S.E.

M.C.A., Inc.

SEC has three files—2—15561-1-1
2—15561-1-2
1—4243-1

Form S-1 (Registration Statement under Securities Act of 1933 (facing sheet) states company's principal office is 9370 Santa Monica Blvd., Beverly Hills, California; Lew R. Wasserman of share address stated as agent for service. Form bear 9/8/59 date of receipt by S.E.C.

S-1 contains undated Prospectus

Agreement among Underwriters:

Lehman Bros. to purchase 20,000 shs for own investment.

Annex A—Underwriting Agreement (Oct. 1959) to Lehman Bros. and "several Underwriters" from M.C.A. pertaining to distribution and transfer of stock.

Annex B—Selling Agreement—(Oct. 1959) Lehman Bros. to other underwriters (unnamed).

[fol. 20hhh] EXHIBIT 2

A Law Agreement, and Consent merging Management Corporation of America and Revue Productions, Inc. into MCA Inc. and Plan, Agreement and Consent for Exchange of Stock of Music Corporation of America, M.C.A. Artists, Ltd., and MCA TV Ltd. for Stock of MCA INC. (dated August 3, 1959.

Art. IV—states: "The nature of the business, or objects or purposes to be transacted, promoted, or carried on are 'To engaged in all phases of the entertainment industry'".

(Comment: then follows 6 pages, excluding nothing which they cannot do.)

Art. IV-8 "The corporation is to have perpetual existence". Art. V "Convertability of various classes of stock of various companies into shares of MCA. INC.

The officers signing the Plan for the respective corporations were:

MCA INC. Jules C. Stein, Lew R. Wasserman, Albert A. Dorskind, and John W. Findlater, Sec.
Management Corporation of America: Maurice B. Lipsey, Pres., Richard S. Harris, Secy.
Revue Productions, Inc.: Taft B. Schreiber, Pres. and Manning O'Connor, Sec.
Music Corporation of America: Lawrence R. Barnett, Pres., John W. Findlater, Asst. Secy.
MCA Artists, Ltd.: Herbert I. Rosenthal, Pres. and John W. Findlater, Sec.
MCA TV Ltd.: David A. Werblin, Pres. and Walter Hanley, Secy.

AGREEMENT BY SHAREHOLDERS (attached to Plan) to exchange stock under above plans name: Berle Adams, Lawrence Barnett, De Arv, G. Barton, David Baumgarten, William Beutel, Alfred J. Bolton, Ernie J. Barbec, Herbert T. Brenner, Robert S. Brenner, James K. Breyley, Ned Brown, George J. Campbell, George Chasin, Herman Citron, Albert A. Dorskind, John Dugan, Lawrence Evans, Freddie Fields, John W. Findlater, Henry Freedland, Louis Friedland, Jerry Gershwin, Edwin K.

Greene, Walter A. Hanley, Edd Henry, Jean vonder Heuvel, Richard Irving, Jay Kanter, Don Patrick Kelley, Roaul Kent, Charles B. Koren, Karl Kramer, Jennings Lang, M. C. Levee, Jr., Richard Lewis, Louis D. Lindsay, Maurice B. Lipsey, Abraham Meyer, Alan J. Miller, Charles Miller, Manning O'Connor, Arthur L. Park, Jr., Michael J. Rockford, Herbert I. Rosenthal, Bernard R. Rubin, Taft B. Schreiber, Morris M. Schrier, Doris J. Stein, Jules C. Stein, Susan Stein, George Stern, Herbert S. Stern, David Sutton, Cecil Tennant, Mort Viner, Lew [fol. 20iii] R. Wasserman, David A. Werblin, Jerome M. Zeitman.

Charles Miller, Trustee for Jules C. Stein, Charles Miller and Edwin Weisl, Trustee for MCA Artists, Ltd. Profit Sharing Trust.

Charles Miller, Trustee for Jules C. Stein,

Charles Miller and Edwin Weisl, Trustee of Music Corporation of America Profit Sharing Trust.

American National Bank & Trust Company of Chicago as Trustee U/A with J. C. Stein, dated 12/26/35 and known as Trust No. TA-3699.

American National Bank & Trust Co. of Chicago, as Successor Trustee, Acct. No. 4 U/A with D. J. Stein, dated 12/9/39, known as Trust No. TA-7192.

American National Bank & Trust Co. of Chicago, as Successor Trustee, Acct. No. 6 with D. J. Stein, dated 12/9/39 Trust No. TA-7193.

American National Bank & Trust Co. of Chicago, as Successor Trust Acct. No. 6, U/A with D. J. Stein, dated 12/9/39, known as Trust No. TA 7194.

American National Bank & Trust Co. of Chicago, as Successor Trustee Acct. No. 8, U/A with D. J. Stein, dated 12/11/39, known as Trust No. TA-7250.

American National Bank & Trust Co. of Chicago, as Successor Trustee Acct. No. 9, U/A with D. J. Stein, dated 12/13/39, known as Trust No. TA-7251.

American National Bank & Trust Co. of Chicago, as Successor Trustee, Acct. No. 10, U/A with D. J. Stein, dated 12/11/39, known as Trust No. TA-7252.

American National Bank & Trust Co. of Chicago, as Suc-

cessor Trustee, Acct. No. 1, U/A with D. J. Stein, dated 12/8/39, known as Trust No. TA-7301.

American National Bank and Trust Co. of Chicago, as Successor Trustee, Acct. No. 2, U/A with D. J. Stein, dated 12/8/39, known as Trust No. TA-7302.

The First National Bank of Chicago, as Trustee under agreement with Jules C. Stein, dated 12/9/35

Lehman Bros. as Trustee for Jean vonder Heuvel.

Lehman Bros. as Trustee for Susan Stein.

H. L. Oppenheimer, as Trustee for Lawrence Jones, deceased for trusts dated 12/7, 12/13, and 12/19 respectively.

The Jules C. Stein Foundation
The William Street Synagogue
The Regents of the University of California

Also annexed is a copy of the Certificate of Incorporation, dated 11/10/58.

EXHIBIT 3-a Sec. of State of Delaware certification of certificate of Incorporation.

[fol. 20jjj] EXHIBIT 3-b By-Laws—(directors need not be stockholders)

EXHIBIT 4 None

EXHIBIT 5 Employee stock option plan.

EXHIBIT 6 Opinion of legality by Beilenson, Meyer, Rosenfeld, and Sussman, attorneys, Citizens National Bank Bldg., 9350 Wilshire Boulevard, Beverly Hills, (9/3/59).

Note: There are no Exhibits from 6 to 11.

EXHIBIT 11-A—Profit Sharing Agreement of Music Corporation of America made 12/26/44 between the Company, party of the 1st part, and Jules C. Stein, Karl Kramer, and Lew Wasserman of the 2nd part, (retirement provisions). (This agreement amended from time to time changing parties, shares, etc.)

EXHIBIT 11-B—Profit Sharing Trust of MCA Artists, Ltd., made 12/22/44 between corp. and Stein, Kraus and Wasser-

man. (This Trust was amended from time to time changing persons and financial arrangements.)

EXHIBIT 11-C—Profit Sharing Trust of MCA and TV, Ltd. (California) made —— 1958 between corp. and Stein, Charles Miller, and Edwin Weisl. (This Trust was amended from time to time.)

EXHIBIT 11-D—Synopsis of the MCA Profit Sharing Trust (undated and in booklet form).

Note: There is no Exhibit 12

EXHIBIT 13—Universal Pictures Company, Inc., seller, and MCA, Inc. buyer, consisting of Agreement of Purchase and Sale and Escrow Instructions, Agreement re stores (raw materials), Agreement re Sales Tax, Guaranty by Decca Records, Inc. and Guaranty by Revue Productions, Inc.

EXHIBIT 13-B—MCA, Inc. Owner, and Universal Pictures Company, Inc. Lessee, dated 12/16/58.

EXHIBIT 13-C—Agreement of Sale, Paramount Pictures Corporation and EMKA, Ltd. and Guaranty by Management Corporation of America, MCA TV Ltd., and Revue Productions, Inc., dated 2/21/58.

EXHIBIT 13-D—1st Chattel Mortgage and Pledge by MEKA, as Mortgagor, and Paramount Pictures Corporation, as Mortgagee.

EXHIBIT 13-E—Lease, dated 1/2/59 between Movie Corporation of America as Lessor and MCA Artists, Ltd., as Lessee for lease of real estate.

[fol. 20kkk] EXHIBIT 13-F—Prior Lease of above property made 6/30/58.

EXHIBIT 13-G—Agreement (Lease) between Fifty-Seventh Madison Corporation (598 Madison Avenue) and MCA Artists, Ltd., Music Corporation of America, Revue Productions, Inc., and MCA TV Ltd., dated 6/30/58, for use of chattels and works of art.

(Note: Jules Stein signed as President of the 57th Madicon Corporation and Lew Wasserman as Chief Executive Officer of MCA, Artists, Ltd., Music Corporation of Amer-

ica, Management Corporation of America, Revue Productions, Inc., MCA TV Ltd.)

EXHIBIT 13-H—Standard Form of Office Lease, dated July 1, 1958, between Fifty-Seventh Madison Corporation and MCA TV—Ltd.

EXHIBIT 13-H—As above with Music Corporation of America.

EXHIBIT 13-J—As above with MCA Artists, Ltd.

EXHIBIT 13-K—Office Lease, dated 6/30/58 between The Four Thirty Company (Ill.) and Music Corporation of America, executed on part of Co.(?) and Wasserman for MCA.

EXHIBIT 13-L—Letter Agreement, dated 12/15/58 to Stein from MCA Artists, Ltd. (signed by Wasserman) whereby Stein agreed to sell and assign his rights in two life insurance policies (Penn. Mutual) for $122,802.50 and Massachusetts Mutual for $147,942 to Artists.

MISCELLANEOUS NOTE:

Examination of financial statements filed in the preliminary and various amended prospectii did not disclose variations in the amounts stated therein.

Personnel of the SES on Public Document File Room stated that stock ownership reports, if timely filed, would be presently in process at that agency and not available for public inspection at this time.

[fol. 20111] EXHIBIT No. LA238

Standard & Poors Corporations, June-July 1960, p 1340-I

MCA Inc.

CORPORATE BACKGROUND

Company produces television series and makes production facilities and financing available to independent television producers on a cost plus fee basis. October 8, 1959, it owned 1,657 television negatives—100 one-hour and 1,557

half-hour in length—which it produced or acquired; certain of these negatives being subject to various outside profit participations not in excess of 50%. It also had a co-ownership interest in 525 more such negatives . . . 35 one-hour and 490 one-half hour in length . . . in which other producers contributed certain creative efforts and Co. supplied all production facilities and financing; Co.'s ownership in these negatives varying and averaging 50%. Thru a wholly owned subsidiary also owns 700 pre-1948 Paramount features.

Thru MCA TV Ltd., and wholy owned foreign subsidiaries, Cc. distributes television film series to local, regional, or national advertisers or their representatives, and to television stations or networks in the U.S. and also in such foreign countries as Canada, Australia, Great Britain, Frace, Germany, Japan, Mexico, and others. Such distribution involves licensing of the exhibition of the film series under copyright on a fixed rental basis; creation, development, and dissemination of certain advertising, publicity, and explotation and delivery, storage, and inspection and repair of positive prints used in exhibiting the films. In the U.S. television film licenses may be classified into two categories; network and syndication. The former is usually made with the networks itself or with one or more national sponsors through their advertising agencies for first-run telecasting, sometimes includes reports, or any one of the national networks. A syndication license is usually made with a number of local or regional sponsors, or directly with television stations who in turn release to sponsors.

MCA TV Ltd. distributes the 700 pre-1948 Paramount features purchased in February '58 from Paramount Pictures Corp. by EMKA Ltd., also wholly owned, for $50,000,000. . . . $10,000,000 paid initially, $25,000,000 payable in fixed installments, and $15,000,000 only on a contingent basis (see Long Term Debt).

Music Corporation of America and MCA Artists, Ltd., represent artists in various branches of the entertainment business.

Subsidiaries—wholly-owned—consolidated

Music Corp. of America	Fla.
Music Corp. of America	Del.
MCA Artists, Ltd.	Del.
MCA Artists, Ltd. Inc.	Fla.
MCA Artists (Canada) Ltd.	Canada
MCA TV Ltd.	Cal.
MCA Canada, Ltd. (Canada)	Canada
Sherry TV, Inc.	Cal.
MCA Corp.	N.Y.
EMKA Ltd.	Del.
[fol. 20mmm] Arizona Productions, Inc.	Cal.
Alabama Productions, Inc.	Cal.
Alaska Music Co., Inc.	Cal.
Revue Productions, Inc.	Cal.
Hawaii Music Co., Inc.	Cal.
Helene Productions, Inc.	Cal.
Hawaii Productions, Inc.	Cal.
Management Corp. of America (Unconsolidated)	Cal.
Music Corp. of America, Ltd.	Eng.
MCA (London) Ltd.	Eng.
MCA Artists (England) Ltd.	Eng.
MCA TV (England) Ltd.	Eng.
MCA (England) Ltd.	Eng.
MCA (ITALY) s.p.a.	Italy
MCA (Paris) Ltd.	France
C.I.-M.U.-R.A.	France
Administradora General SA.de C.V.	Mexico
MCA TV (Mexico) S.A.	Mexico
MCA TV Television G.m.b.H.	Germany
MCA (Germany) G.m.b.H.	Germany

Property

"Co. owns Revue Studios on 370 acres at Universal City, Cal. which it purchased in Feb. '59 for $11,250,000 and in which it had added production facilities costing $5,000,000 to Feb. '60. It also rents other office, distribution, and production facilities in various U.S. cities including movie distribution center in Chicago and space in foreign countries.

Part of the Revue Studios is leased to Universal Pictures Co. Inc. for 10 years at a minimum annual rental of $1,000,000.

Incorporated

In Del. 11/10/58 and effective 9/1/59, issued 3,752,590 com. and 17,985 5% pfd. shs to acquire five movie MCA companies related thru common ownership and management . . . Revue Productions, Inc. and Management Corp. of America, which it merged, and Music Corp. of America, MCA. Artists Ltd. and MCC TV Ltd., which, with subsidiaries of the two merged companies, became subsidiaries. The original MCA company was founded in 1924.

Employees

12/31/59—3,000

Officers

J. C. Stein, Chairman
L. R. Wasserman, Pres. and Chief Exec. Officer
A. A. Dorskind, V.P. and Treas.
M. M. Schrier, V.P. & Sec'y.
M. H. Berman, Contr.
J. W. Findlater, Asst. Sec'y.
F. E. Witt, Asst. Treas.

[fol. 20nnn] V.P.s

Lawrence Barnett
M. B. Lipsey
Charles Miller
H. I. Rosenthal
M. J. Rockford
T. B. Schreiber
D. A. Werblin

Directors

J. C. Stein
L. M. Battson
Charles Miller
L. R. Wasserman
W. M. Heymann

Office

9370 Santa Monica Blvd., Beverly Hills, Cal.

Annual Meeting

1st Tues. in June

Stock Data (Probably 38 high—after 17,50 opening—no price range shown)

5% Com. Pfd. $100 par has preference over com. to dividends of $5 per annum and in liq. to $100 and dividends. Redeemable at $100 and dividends (no voting power). Protective Provisions—consent of 2/3 of pfd. is needed to change adversely the rights of pfd.

Common is entitled to dividends amt. of 70% of earnings after a full year's future dividends on pfd. has been set aside. Voting Power—one vote per share, cumulative in election of directors. Subscription Rights—none.

Common offered

Date	Shares	Price	Comm.	
10/8/59	400,000	17.50	$1.10	C. Lehman Bros., NYC, et al; proceeds to retire $6,250,000 short term bank debt and for working capital.

Stockholder

12/31/59—pfd. 24; com. 2,286. Officers and Directors as a group owned 76.7% of the com. 10/8/59 after share common offering, including 35.8% owned by J. C. Stein, Chairman, and 17.9% by L. R. Wasserman, Pres. The Stein family also then owned 79.17% of the pfd.

Transfer Agents

Com.—Chase Manhattan Bank, NYC
First National Bank, Chicago
Registrar: First National City Bank, NYC
Listed: NYSE 11/29/59 symbol MCA
Dividends—none since public offerings.
Auditors—Price Waterhouse Co.

[fol. 20000] Earnings and Finance (Price-Waterhouse & Co.)

Consolidated earnings of MCA, Inc. and Subs on basis of 9/1/59 reorganization—yr. end. 12/31

	Tel. Film and Studio Rentals	Agency Commis.	Tot. Opr. Ren.
1959	$48,136,378	$8,792,414	$56,728,792
1958	38,656,767	8,816,711	47,473,478
1957	30,426,098	8,452,147	38,878,245
1956	23,757,144	7,634,975	31,392,119
1955	17,003,281	6,891,639	23,894,920
1954	8,722,054	5,939,801	14,661,855

Consolidated balance sheet (Co. and U.S. and Can. Subs)

Assets (tot)	(1959)	$70,523,446	(1958)	$54,726,856
Liabilities reflect	(1959)	reflect	$1,798,500	5% pfd. par $100
	"	"	7,476,375	common N.P. V.
	(1958)		1,798,500	pfd.
			562,749	com.

Stock (shs)	Auth.	Outstg.	
	20,000	17,985	5% com. pfd. $100 par.
	5,000,000	3,995,735	com. no. p.v.

(5,000,000 shs includes 250,000 for options to employees)

Long term debt—contr. to pay Paramount Pict. Corp. $20,759,324 (outstdg)
Revolving loan agreement with First National Bank (Chicago)
($3,000,000 outstanding 12/31/59)

Consolidated Income Acct. (Yr. end 12/31
(Co. and U.S. and Canadian subs)

	1959	1958
Television film and studio rents	$49,136,378	$38,656,767
Agency commissions	8,792,414	8,816,711
Operating income	11,441,904	8,114,970
Other income	849,704	712,467

Consolidated Balance Sheet (Extracts)

Net property	14,415,122	1,094,069
Est. part of purch. feature film to be amortized after 1 yr.	25,093,478	30,607,218
Invests. and advs. fgn. subs.	576,143	524,157
Other invests.	127,356	57,531
Telev. film—in release—net	10,706,944	6,644,737
unreleased	2,271,091	1,001,786
Feature film purch. for Paramount Pics net	4,656,801	3,327,508
Prints, trailers and supplies	1,151,197	828,011

[fol. 20ppp] PETITIONER'S EXHIBITS NOS. 15-A THROUGH 15-R (excerpts)

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

Docket No. 12782

In the Matter of STUDY OF RADIO AND TELEVISION NETWORK BROADCASTING

* * * * * * *

PROCEEDINGS

Chief Hearing Examiner:

* * * * * * *

[fol. 20qqq] The full authority of the Commission, within the limits of its order, has been delegated to me as presiding officer, pursuant to Section 5(d) of the Communications Act.

Subject only to review by the Commission in certain instances, for purposes of this proceeding the presiding officer is clothed with the full powers of the Commission itself.

Additionally, I should point out that, notwithstanding some similarity in procedure, this proceeding is not a hearing in the usual sense—that is, it is not judicial in nature—but, as indicated, it is investigatory or fact findng.

[fol. 20rrr] There are no parties, as such, no litigating parties, and the procedural rules usual to quasi-judicial administrative cases do not apply in their entirety. In other words, the objective of this proceeding is to ascertain facts and make an official record thereof for use by the Commission in performing its functions under the Communications Act.

Those who give testimony appear as witnesses for the Commission. Counsel will request their appearances, or, if necessary, they will be summoned to appear by process issued by the presiding officer.

While no persons, other than the Commission representatives, may directly participate in the proceeding, any witness will, of course, be permitted to be accompanied by, and to consult with, counsel, if he so desires.

* * * * * * *

[fol. 20sss] Chief Hearing Examiner: Mr. Bryant—when a witness desires to consult with his counsel, he must make that desire known on the record, and the Presiding Officer will rule. Do you understand, Mr. Orr.?

[fol. 20ttt] The Witness: Yes, sir.

Chief Hearing Examiner: No information shall be volunteered by counsel without permission. I am suggesting no impropriety so far, but I want to make that clear.

The Witness: Do I ask you, Your Honor?

Chief Hearing Examiner: Just announce it on the record, and I will rule.

Proceed.

By Mr. Bryant:

Q. I believe we were at the Roaring Twenties.

A. I would like to check with my counsel.

Chief Hearing Examiner: Any objection, sir?

Mr. Bryant: None, sir.

Chief Hearing Examiner: It may be done.

* * * * * * *

[fol. 20uuu] WILLIAM T. ORR, having been previously duly sworn, resumed the stand, was examined and testified, further, as follows:

Direct Examination—resumed

By Mr. Bryant:

. . . . . .

[fol. 20vvv] Q. Now, MCA is also engaged, through its Revue division, in the production of a number of series [fol. 20www] for television, it is not?

A. That is true.

Q. Now, did this situation have anything to do with the policy that you arrived at of developing your own talent for your television series?

A. May I ask a question, Mr. Bryant?

Q. Yes.

A. I don't know what year Revue was started in. I don't know whether Revue was in existence when we started or not.

Q. Well, let me phrase the question:

As you have gone along—we can probably get that date, I am sure we have it. My recollection is 1954 or 1955, around in there.

Well, I think the question, sir, is this:

Did these factors enter into your decision in establishing a policy of developing your own talent for television shows? It would seem to me it either did or did not.

A. The policy of their being packagers?

Q. The fact that they were engaged in both talent representation, and either as packagers or producers?

A. No.

Q. It did not?

A. No.

. . . . . .

[fol. 20xxx] WILLIAM DOZIER, was called as a witness, and having been first duly sworn, was examined and testified as follows:

Direct examination

By Mr. Bryant:

. . . . . .

[fol. 20yyy] Q. Now, generally speaking, you do your own selling, is that correct?

A. Yes, sir, always. We have no shows that are handled by any other selling organization.

Q. Now, have you had similar experience with MCA?

A. Only one instance in the last—since I have been at Screen Gems, where we were offered a new series idea by MCA, and it did not get far enough for us to discuss on what basis they were offering it—whether they were offering it as packagers or how.

I would assume, though, they were offering it as packagers in the first instance, which would be customary. But we did not like it, and there was no—discussions never got beyond that.

And that was only one that I recall in the past year.

[fol. 20zzz] Q. Now, I assume that you use talent in various talent agencies in your productions, is that correct?

A. Yes, all of them.

Q. Now, does this include talent from William Morris and MCA?

A. Yes, sir.

Q. Does this include star talent? Do you agree with Mr. Orr that stars can be identified out here?

A. Except for certain fringe areas, yes. Gray areas.

Q. Do you use star talent, or top writers, and top producers, if these are identifiable categories, who are represented talentwise by MCA and William Morris?

A. Yes, we have.

Q. Which ones?

A. Well, Donna Reed, for example, is a client of MCA.

Q. I see.

A. And they have no package position on the show. We

did a series—we did a pilot this last season with Shirley Jones, who is a star, who is a client of the William Morris office, and they had no package position in that show—had it gone on, they would not have had. We have Elaine Stritch in My Sister Eileen playing the star role of Ruth. She is a client of MCA, and they have no package position [fol. 20aaaa] in that instance.

Those are the only three—those are the only so-called stars.

Q. Well, have there been other occasions where you had sought their star talent, or their top creative people, and failed?

A. We have tried to get people from both agencies, and others, and have not got them, for various reasons—either because they did not like the show we wanted them to do, or they preferred some other show.

Q. Well, are you saying that in your experience, that you do not find the fact that they are packaging a hindrance to you in procuring their top talent for your shows, is that correct?

A. It has not been, no, a hindrance.

Q. Well, in dealing with MCA do you have any information as to whether you get top talent for the same prices, say, that it might be available to Revue?

A. I am sure we do.

* * * * * * *

[fol. 20bbbb] DICK POWELL, having been first duly sworn, was examined and testified, as follows:

Direct examination.

By Mr. Bryant:

* * * * * * *

[fol. 20cccc] Q. I have asked this question of several other producers here, Mr. Powell. You are aware that the Music Corporation of America, through its Revue Productions, produces shows for television, and has a number of shows on the air. Are you aware of that?

A. Yes, sir.

Q. You are also aware, are you not, sir, that the Music [fol. 20dddd] Corporation of America, through another division, engages in packaging of shows?

A. Yes, sir.

Q. Are you also aware that the Music Corporation, through another division, if I understand it correctly, acts as talent representative for many of the top stars and others out here; is that correct?

A. Yes, sir.

Q. Now, you have now had a very considerable experience in the production of television shows, and, I assume, in procuring talent for television shows here in Hollywood. That is correct, is it not?

A. Yes, sir.

Q. Now, have you found yourself, in the procurement of talent, confronted with situations where you were unable to get the talent that you wanted from MCA, or talent that you would have liked to have negotiated for your shows?

A. I wouldn't be aware of the specific conditions. When you say talent we wanted, we buy a lot of people from MCA.

Q. Let's confine ourselves. I understand from several witnesses here that there is a concept out here of star talent or top talent, and that sort of thing. Is that correct?

A. Yes, sir.

[fol. 20eeee] Q. Is this an understandable term to you?

A. Yes, sir.

Q. Is a great deal of this talent represented by the Music Corporation of America?

A. Yes, sir.

Q. Now, from your experience in the business, is this talent generally available to you as a producer, and I am talking of the top talent, say, in competition with review?

A. I couldn't answer that in detail.

Q. Well, answer it in any way.

A. I don't know what people they have requested.

Q. Well, aren't you generally in touch with the functions of your business?

A. Oh, yes. For instance, we are doing a show right now, today, with Joan Crawford, on Zane Grey Theatre, and she is an MCA client.

Q. Well, I believe you told me that you dealt with Miss Crawford directly, and she wanted to come; is that correct?

A. That is right.

Q. And did you also tell me that this might well have been simply in spite of MCA, rather than because of them?

A. I don't know her feelings about it.

[fol. 20ffff] Q. Well now, coming to this Joan Crawford business—if I am wrong, please correct me.

A. Yes, sir.

Q. Is it a fact that a year or more ago you contacted Miss Crawford with the idea of putting her into a series?

A. Yes, sir.

Q. And she was willing to do so?

A. Yes, sir.

Q. And that you were later informed that she was too busy to do this?

A. Yes, sir.

Q. And whom were you informed that by?

A. By the producer of the show.

Q. Well, did you then ask Miss Crawford what happened?

A. Yes, sir. As a matter of fact, we had a script that she had agreed to do.

Q. Yes. I believe you told us that.

A. And we were holding the script. And if she didn't intend doing it, we wanted to do it with someone else.

Q. Yes.

A. So I asked her for a specific answer.

Q. Yes.

A. And I received it, and she did the picture.

Q. Now, this was going on over a period of time; is that correct?

[fol. 20gggg] A. That is right, sir.

Q. When were you told that she was too busy to do this?

A. I could not remember the date. But I would say it would be three or four days before she agreed to do it.

Q. Now, let me ask you a direct question, and if I am wrong, and my memory is wrong here, please tell me.

Didn't you tell us that it was your understanding that she was willing to do it, but that she had been advised not to, or persuaded not to by her agents, MCA?

A. I had been informed that by a second party, yes, sir.

Q. I see.

A. By the producer of the show.

Q. And who was the producer of the show that told you that?

A. At that time, Mr. Al Hudson.

Q. I see. Did Hudson tell you how he knew?

A. He had gone through the regular channels, through her agent, MCA. I think he is an MCA client.

Q. You don't know?

A. I don't know.

Q. Well, were you told by Mr. Hudson that he had been informed that Revue was going to need Miss Crawford?

A. Yes.

[fol. 20hhhh] Q. And therefore you couldn't have her?

A. That is right, sir.

Q. And Review is a subsidiary of MCA, or it is a division of MCA?

A. I think so, yes.

Q. Do you have any other instances of the same sort involving MCA, Mr. Powell?

A. No specific instances. There are times when we would like to get possibly somebody who just is not available at that time, or available for television whatsoever.

* * * * * * *

[fol. 20iiii] Don Fedderson, having been first duly sworn, was examined and testified, as follows:

Direct examination.

By Mr. Bryant.

* * * * * * *

[fol. 20jjjj] Q. Now, there has been some testimony here this week, Mr. Fedderson, which might indicate—in which [fol. 20kkkk] producers have said that they—or at least a producer has said that he has found himself at somewhat of a disadvantage in procuring talent because of the activities of the principal talent agencies here, either in pro-

duction or packaging. Are you conscious of any problem there? Is it difficult for you to compete because MCA operates through Revue, or William Morris packages in a number of places, or other packagers are operating here?

A. No——

Q. Is that a clear enough question for you to answer?

A. Yes, yes, I think so. No, I surmise we are a favorable client of MCA. We have paid them commissions of a little less than $2 million in the last five years. But we have never had any problems. They have never suggested that we use some of their people.

William Morris—we have never had any problems there that I know of. We had different casts on the Millionaire for six years, every single week. We did business with everybody. Every time we have a new show, such as shows we have in preparation now, MCA sends over who they suggest, and sometimes, many times more than half of their people they suggest, they don't even have them.

Q. In other words, in this continuing arrangement with MCA, it is your testimony that certainly not uniformly, [fol. 20llll] and perhaps as much as half the time, the people they suggest are not their clients; is that correct?

A. That is correct. And we have never had any—when we have dealt with William Morris, we have never had anybody exert any pressures. We have found the entire industry to be as fine a basis of integrity. We have made deals by handshakes, over the phone, in amounts involving millions of dollars, and never had anybody double-cross us. I don't know how to answer your question any better than that. It is just that we have never had any problems.

Q. I think the question was simply, has it been your experience that you were at a competitive disadvantage in any way in obtaining talent because of these arrangements.

A. No, sir.

. . . . . .

[fol. 20mmmm] CURTIS KENYON, was called as a witness and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Bryant:

* * * * * * *

[fol. 20nnnn] Q. Now, let me read you a paragraph from the second page of the letter.

It reads, as follows, and I quote:

"If we attempt to negotiate such a contract with ANG, or with anyone else, and we do not arrive at a contract, and as a result thereof we promulgate regulations covering the dealings of our members with agents in the television film agency business, such regulations will not prohibit our members from dealing with you as agents in the television film field by reason of the fact that you are also engaged in the television film production business, nor will such regulations in any way conflict with any of the provisions [fol. 20oooo] herein contained."

Now, as a matter of fact, by this letter, Mr. Kenyon, did the Guild not bind itself apparently in perpetuity not to make any regulation which would result in preventing MCA from continuing both as a producer of television film and a talent agency representing the members of your organization?

Mr. Taback: Excuse me. At this point I think I would have to object.

Mr. Bryant: Just a moment, sir.

Chief Hearing Examiner: I don't know whether you were here, sir, when we laid down the ground rules of the proceeding?

Mr. Taback: I am sorry, I was not, your Honor.

Chief Hearing Examiner: Counsel will not be heard from directly, there being no parties as such, or litigants in this case.

However, counsel is at liberty to consult with the witness, his client, if the witness so desires.

We will proceed on that basis.

The Witness: On that basis, your Honor, I would like to consult.

Chief Hearing Examiner: Very well.

The Witness: Mr. Bryant, speaking as a layman, I just don't believe I can answer that. It is obviously a legal [fols. 20pppp-20qqqq] question.

Chief Hearing Examiner: Mr. Bryant, I wonder if the witness understands what is meant by the question.

Mr. Bryant: Yes, sir. I don't think it calls for a legal conclusion.

I think it is a simply a matter of your understanding of what this document was intended to so. And wasn't that precisely it? Wasn't this part of the negotiations and your understanding when this document was prepared and sent to MCA?

Mr. Kenyon: Well, not entirely.

* * * * * * *

[fol. 20rrrr] Direct examination.

By Mr. Bryant:

* * * * * * *

My name is Edward H. Bronson. I am director of television code affairs of the National Association of Broadcasters, with offices at the NAB headquarters, 1771 N Street, N. W., Washington.

* * * * * * *

Mr. Morris: My name is Frank J. Morris. I am assistant director of television code affairs for the code review board of the National Association of Broadcasters. My headquarters are at 1717 North Highland Avenue, Hollywood, California.

* * * * * * *

[fol. 20ssss] Mr. Anello: Mr. Examiner, I don't think——

Chief Hearing Examiner: I am sorry, I can't hear you, sir.

You are at liberty to consult the witness in consultation. I will not hear arguments, nor will I hear objection from counsel.

We have no parties here, as such.

Mr. Bryant: Do you wish to consult with your counsel?

Mr. Morris: May I?

Chief Hearing Examiner: Yes.

Mr. Morris: Thank you.

(The witness consults with counsel.)

Mr. Bryant: I believe the question was answered. Would you go ahead? Unless you have some question you wish to raise.

Mr. Morris: No.

. . . . . .

[fol. 20tttt] Chief Hearing Examiner: May I interrupt you, sir.

Let me ask you whether you are satisfied that, generally speaking, television programs are not having adverse ef-

[fol. 20uuuu] fects on any segments of the population, particularly teenagers?

Mr. Morris: I don't consider myself qualified to answer that question, sir.

Chief Hearing Examiner: Have you given it any thought, sir, in connection with your work? I assume you must have.

Mr. Morris: Yes, a very great deal.

Chief Hearing Examiner: You have no view to give the Commission in that behalf?

Mr. Morris: May I consult with counsel?

Chief Hearing Examiner: I see no reason why counsel should be consulted on a thing of this kind. There is no legal question presented. You have reviewed, over a period of 14 months, some 300 plays being produced and readied for consumption by the public.

Now, you must have some views, you must have given it thought considerable time. What do you say here now—without consulting counsel? You don't need the advice of counsel to answer a question like that.

. . . . . .

[fol. 20vvvv] Mr. Anello: Mr. Examiner, we have with us——

Chief Hearing Examiner: I am sorry, Mr. Anello, you are not under oath here. No counsel will be heard. There are no parties as such. You may advise the witness not to answer any question that I propound or counsel may propound.

Now, Mr. Bronson, what do you say, if you know?

* * * * * * *

[fol. 20wwww] TAFT SCHREIBER, having been first duly sworn, was examined and testified, as follows:

Direct examination.

By Mr. Bryant:

* * * * * * *

[fol. 20xxxx] Chief Hearing Examiner:

He is at liberty, if he wishes, to consult with his client on the stand at any time, and, likewise, he is at liberty to consult with counsel for the network study office.

But I cannot hear argument of counsel—only statements of the witness, who will reflect the views of counsel whenever he desires to do so.

Mr. Bryant: Well, sir——

Mr. Susman: Just a moment sir. I would like to make a record on this, if your Honor please—

Chief Hearing Examiner: There will be no record made. You are out of order, sir. I have ruled. I will not hear [fol. 20yyyy] you in this proceeding. We are off the record while you talk.

You may consult with the witness. That is the ruling, right or wrong.

You may have your exception to that, through the witness.

I will not hear you.

Mr. Bryant: May we, sir, have a short recess here to

afford Mr. Schreiber an opportunity to consult with Mr. Susman?

Chief Hearing Examiner: Very well. Take ten minutes. [fol. 20zzzz] Mr. Bryant: May I say just at the moment, for the record, before we leave, that I, anticipating that a situation of this kind might arise, had a discussion with Mr. Susman before we came in here this morning, and fully acquainted him with the procedures which your Honor had laid down in this proceeding.

Chief Hearing Examiner: Very well, sir.

Mr. Bryant: Ten minutes, sir?

Chief Hearing Examiner: Ten minutes.

(At this point a short recess was taken, after which the hearing was continued.)

Chief Hearing Examiner: Are you ready to proceed, gentlemen?

Mr. Bryant: Yes, sir.

I think there is an open question on the record—if the reporter would read it.

(The question was read.)

Mr. Susman: Mr. Hearing Examiner, will all deference, your Honor——

Chief Hearing Examiner: I cannot hear you, sir. I will not.

Strike the statement.

Mr. Susman: I think I have a right, sir, to make a record in this matter.

Chief Hearing Examiner: You have a right to make a [fol. 20aaaaa] record through your client. This is not an adjudicatory proceeding. It is investigatory.

I will not hear argument or objections from counsel. The witness is at liberty to refuse for any reason you advise to answer any questions propounded here.

I shall not hear you.

I have not heard any other counsel in this matter.

Mr. Susman: Sir, no lawyer can operate effectively—

Chief Hearing Examiner: Strike the statement from the record.

I warn you, sir, I will have you ejected from these proceedings, if you persist in this contempt.

Let's proceed.

. . . . . .

[fol. 20bbbbb] The Witness: Apart from the fact that such a purpose is plainly wrong and unjustified, and outside of the Commission's authority, in the posture and context the hearings have taken, I feel that I should have the effective and knowledgeable assistance of counsel.

The so-called ground rules laid down by the Hearing Examiner in these hearings, beginning on October 10th and repeated from time to time as the hearings progressed, does not grant me or my company that right. On virtually every occasion when an attorney for one of the witnesses has attempted to make a statement or an objection, he has been summarily directed by the Hearing Examiner to be quiet and that he had no standing to say anything.

. . . . . .

[fol. 20ccccc] Mr. Susman: Let me make one thing very clear at the outset: The approach of my clients to the questions before you has always been one of trying to find a common ground between the matters that are pertinent from the Commission's standpoint and the questions that [fol. 20ddddd] are pertinent from the standpoint of my clients.

We are not asking for special convenience. All we have asserted is that the problems posed by the position taken by the Commission and its representatives are problems of substance, problems of significance and problems that we think should be worked out to the extent that we are able to do so with the Commission and its representatives. For that reason throughout the history of this proceeding we have tried in every way we know how to attempt to work out some procedure that will meet the Commission's situation and will also take cognizance of our own.

For example, we proposed that we have an oral argument before the Commission so that we could explain these matters in some detail. We asked that the Commission's

representatives meet with us either here or in Washington so that we could attempt to work out by some sort of stipulated procedure a set of rules that would, as I said, take cognizance of the Commission's situation and also recognize our own.

This is not a question of special convenience to us. This is simply a question involving matters of consequence to this company that I represent. Now, I do not want to get involved in any discourse on administrative law and the cases over the years, but one fact comes through very clearly from the whole history embodied in this field of law, and that is that a Commission and a Federal administra-
[fol. 20eeeee] tive agency such as the FCC and others traditionally and by legal decision has a great deal more power, if I may use that term, over people who are its licensees or applicants for licenses than it does over third persons.

Now, certainly within given areas, and those areas are variable according to the many, many decisions in this field, it depends on circumstances to a certain extent, Commissions have certain investigatory powers over third persons, but only within limits.

In our considered judgment those limits have been transcended in this particular proceeding. The questions that are posed to our clients go to every facet of their business. Evidence, information and data, to quote from the Order of the Commission, as to the packaging of programs and the policies, practices and activities of MCA, Inc., in connection with the production, casting, packaging, selection and sale of programs for television exhibition.

This simply opens up a complete inquiry into all of the activities of MCA and requires it if asked to disclose all of its business information to its many competitors and to make a public record of all of its activities. This we think is too broad even if a licensee of the Commission were concerned. We think it is clearly and patently beyond the
[fol. 20fffff] jurisdiction of the Commission, beyond the enabling legislation under which it operates in this particular instance.

Now, the problem that is before Your Honor is somewhat magnified by the fact that we have proceeded at the beginning on the assumption that the Commission was recognizing that the Administrative Procedures Act applies

to proceedings of this nature. Somewhere along the line for the first time the argument was raised in the face of our contention that the Administrative Procedures Act had not been followed, that it was not applicable. That, in turn, led to a considered inquiry into the question of what rules are applicable and what rules should be applied in this situation.

If I understand Mr. Bryant correctly he is stating in effect that Your Honor can make up the rules which in your judgment are proper as the hearing proceeds and that whatever ruling Your Honor makes with regard to questioning, the scope of the inquiry, relevancy, the rules that are applicable with regard to representation by counsel, those are rules that prevail in a matter of this nature.

Now, we respectfully differ with that position. We believe, and we believe the law is clear on the point, that the Administrative Procedures Act does apply to a hearing of this nature. I have some familiarity with the background of this Act, I know the work that went into it, I believe I know the intent of the Act itself. It was designed to lay down the ground rules by the Act, not by the Com- [fol. 20ggggg] mission in contravention to the provisions of the Administrative Procedures Act.

Now, I think manifestly those provisions of the Administrative Procedures Act have not been observed in this particular proceeding.

Again, if I understand Mr. Bryant correctly, he says that there is no necessity, or the Commission takes the position that Section 3 of the Administrative Procedures Act does not apply here, therefore there is no necessity to publish rules in advance.

Again, if I understand him correctly, he says that Section 6[a] of the Administrative Procedures Act with regard to the right of counsel does not apply here and in any event if it did apply it has been followed in this particular situation.

Now, on the latter point let me say this very quickly. It is a far cry to have the right to be represented, advised and accompanied by counsel as stated in the Administrative Procedures Act and to have the right under the ground rules that Your Honor has advanced. The difference is this: Under the Administrative Procedures Act the lawyer acts

as a lawyer and the client acts as a client. Under the procedure that Your Honor advances the client acts as the lawyer and the lawyer is placed in the position of being a consultant.

It makes a complete and a comprehensive knowledge of the law a necessity from the client's standpoint in order [fol. 20hhhhh] that a legal position may be properly advanced. That is the reason we take issue primarily with the ground rule in that regard.

Now, again, if Mr. Bryant's statement is properly understood by me, he feels that once the Commission has ruled in a matter that is the end of it. Well, first of all let me say this: that the whole concept of Federal administrative agencies is that the administrative agency position is entitled to recognition by the courts, but is not a decisive and final and definitive answer. There is a system of review in all of our statutes on the point that permits our courts and not the administrative agency to lay down the definitive and final answers with regard to problems of the kind that we are now concerned with.

Now, in our motion yesterday we asked that as a matter of convenience to all concerned not only the Government's time and money but our own are also involved here, that the hearing proceed under certain specified procedures that would permit the rights of all parties to be preserved and protected and at the same time would obtain an early and I hope complete answer to the questions that are before us. These questions are as important to us as I am sure they are to Mr. Bryant and we are as interested as he is in having these questions answered specifically and answered so that there can be no question about them.

[fol. 20iiiii] Now, Mr. Bryant says that there is very little law on the question of when the confidentiality features should be preserved, when the public interest enters into the picture. This, of course, is somewhat of a circular thing, because your feeling is in the matter of public interest and the preservation of the confidential business and information of a competitive private company.

But be it as it may, by again carry his argument through to its logical conclusion he reaches the conclusion that your Honor should determine, when specific questions are asked, what should be answered because it is not convenient in

your judgment, and what should not be answered because it is confidential.

As a matter of fact, Mr. Bryant's statement really goes beyond the one case that has dealt with these questions in some detail, and that's the Cohn case in 1957 in New York; but he takes the position that even the Cohn case is wrong, because even in certain instances detailed financial information should be disclosed in this particular proceeding.

Now, at one point along the line, in the early days of this matter, we asked Mr. Bryant to furnish us with specific questions and specific lines of interrogation so that we could determine beforehand what we felt we could go into as a matter of public disclosure to our competitors and to others, and what we felt the well-being of our company required us—and I might add, of our clients, because in [fol. 20jjjjj] some cases we act in a representative capacity —required us to maintain within the confines of our own company. That, incidentally, was the procedure that was followed in the Cohn case in 1957, when there was a written questionaire submitted by the Commission, and not a matter of oral interrogation for any possible and all areas of inquiry under the Commission's order that exist here would be open for testimony.

Mr. Bryant—and I do not impugn his motives, any more than I'm sure he doesn't impugn mine in this matter, felt that it was not in keeping with his obligation, as he saw it, to furnish that information in advance to us. I say that without that information, and without the opportunity to determine precisely where the area of confidentiality begins, it is not possible for our clients to testify with regard to all of the information regarding their busness that the order of the Commission imports.

Now, again, I urge that the procedure that we have suggested be followed in this case. We urge that the information be set forth in a non-public proceeding; that we be given the right to counsel that the Administrative Procedures Act says we have the right to afford our clients; that in the event we are held to be correct in the positions advanced in a later court proceeding the material will be maintained on the non-public docket of the Commission.

If we are wrong, we abide by the decision of the courts. [fol. 20kkkkk] When the courts decide matters of this sort,

we will comply with every requirement imposed by the courts.

We are perfectly willing to proceed on that basis, which in our judgment seems to me to take care of the problems from the Commission's standpoint, and also recognizes are own serions business problems that are involved in a matter of this sort. Thank you.

. . . . . .

[fol. 20llllll] TAFT SCHREIBER, having been first duly sworn, was examined and testified as follows:

The Witness: Mr. Cunningham, may I make a statement?

Chief Hearing Examiner: If you would.

The Witness: Mr. Cunningham, Your Honor, Mr. Bryant, for the reasons stated in the petition and motion [fol. mmmmm] that was filed in my behalf, and in behalf of my company, and upon advice of counsel I cannot and will not answer any questions in this regard, and not until the Court acts upon the propriety of this position will I give answer to any of these statements.

Chief Hearing Examiner: May I have a copy of the Communications Act?

Mr. Bryant: Yes, sir.

Chief Hearing Examiner: I think it is only fair, Mr. Schreiber, that I inform you, if you have not already been informed, of the provisions of Section 409[m] of the Communications Act of 1934, as amended, which reads:

"Any person who shall neglect or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, schedules or charges, contracts, agreements and documents if in his power to do so in obedience to his subpoena or lawful requirement of the Commission, shall be guilty of a misdemeanor and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $100.00 or more than $5,000.00 or by imprisonment for not more than one year or by both such fine and imprisonment."

I assume your counsel has pointed that out, but I wanted the record to show that it has been.

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[fol. 20nnnnn] Chief Hearing Examiner: Therefore, with reference to 409 (m), what are you proposing?

Mr. Bryant: Well, that is a matter, sir, within the judgment of the Attorney General of the United States. The record will be made available to him for such actions as he may deem appropriate.

[fol. 20ooooo] I might say, sir, that our instructions were, when we came out here, from the Commission, that if we were accorded the same sort of treatment from these witnesses as we received when we were here last October, which you found to be, and in which the Commission sustained you in finding to be contumacious and defiant, that then the Commission felt that the record should be turned over to the proper prosecuting officials for their consideration.

Chief Hearing Examiner: And it will be so turned over, I take it?

Mr. Bryant: Yes, sir.

• • • • • • •

[fol. 48] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 1258-61-Y

FEDERAL COMMUNICATIONS COMMISSION, Petitioner,

v.

TAFT B. SCHREIBER, AND MCA, INC., Respondents.

ANSWER TO PETITION FOR ENFORCEMENT OF A SUBPOENA AND ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION, AND STATEMENT OF ISSUES.—Filed October 4, 1961

Respondents, Taft B. Schreiber and MCA Inc. (incorrectly sued herein as MCA, Inc.) answer the Petition for Enforcement of a Subpoena and Orders of the Federal Communications Commission on file herein, as follows:

I

Respondents admit the allegations of paragraphs I and II.

II

Referring to paragraph III, respondents admit and allege that the Communications Act of 1934, as amended, gives the Commission the powers set forth in said Act, as limited and defined by the provisions of other applicable law, case and statutory, including the applicable provisions of the Administrative Procedure Act (5 U.S.C. §1001, et seq.,); that §409(e) and §403 of the Communications Act contain the [fol. 49] language set forth in the statute; and that the subpoena and orders sought to be enforced were issued on the dates set forth in said paragraph III. Except for the foregoing express admission and allegations, respondents deny the allegations of paragraph III.

III

Referring to paragraph IV, respondents admit that the Commission's order of February 27, 1959, contains the language set forth in said order and that the Commission, under its Docket No. 12782, has been conducting a series of hearings with respect to television programming and content. Respondents are without knowledge or information sufficient to form a belief as to the truth of the averments with respect to the purpose of said hearings and the matters sought to be determined thereby. Except for the express admissions and allegations above contained, and except for those matters denied for lack of knowledge or information, as aforesaid, respondents deny the allegations of paragraph IV.

IV

Referring to paragraph V, respondents admit that a subpoena duces tecum signed by James D. Cunningham, Chief Hearing Examiner of the Federal Communications Commission, directing respondent Schreiber, as vice-president of MCA INC., to appear before Chief Hearing Examiner James D. Cunningham on October 21, 1960, at 10:00 A.M. at the Court Room of the United States Court of Appeals for the Ninth Circuit, Los Angeles, California, to testify and to produce specified documentary evidence as described in an annex attached to the subpoena, was served on respondent Schreiber on October 17, 1960, at 9370 Santa Monica Boulevard, Beverly Hills, California. Except for the foregoing express admission, respondents deny each and every allegation contained in said paragraph V.

[fol. 50]

V

Referring to paragraph VI, respondents admit the allegations contained in the first sentence thereof. Respondents further admit that respondent Schreiber appeared at the time and place alleged, accompanied by his attorney, Allen E. Susman, Esq., and acknowledged service upon him of said subpoena, and acknowledged that he was in possession of the documentary evidence called for by Annex B thereof. Respondents further admit and allege that respondents, under date of October 28, 1960, filed a petition for review

before the Commission, pursuant to Section 1.47 of the Commission's Rules and Regulations and to Sections 5 and 405 of the Act. Respondents further admit and allege that the Commission released an order dated January 27, 1961, containing the language set forth in said order. Except for the foregoing express admissions, respondents deny each and every allegation contained in said paragraph VI.

VI

Referring to paragraph VII, respondents admit that the Commission released orders dated January 27, 1961, and February 3, 1961, which contain the language set forth in said orders, and that both said orders were served upon respondents. Respondents further admit that the proceeding was reconvened in Los Angeles, that respondents were present in the hearing room and were accompanied by counsel. Except for the foregoing express admissions, respondents deny the allegations of paragraph VII.

AFFIRMATIVE DEFENSES

First Affirmative Defense

Respondents allege as follows:

I

Section 6 of the Administrative Procedure Act [60 Stat. 240, 5 U.S.C. §1005] provides that:

[fol. 51] "(a) Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative."

Section 2 of the Administrative Procedure Act [60 Stat. 237, as amended, 5 U.S.C. §1001] provides that:

"(b) 'Person' includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies."

II

The Commission failed and refused to permit respondents the right to counsel prescribed by the aforesaid provisions of the Administrative Procedure Act, the provisions whereof were and are applicable to the hearings and inquiry in issue.

SECOND AFFIRMATIVE DEFENSE

I

Section 3 of the Administrative Procedure Act [60 Stat. 238, 5 U.S.C. §1002] provides as follows:

"Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization, including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and methods by which its functions are channeled and determined, including [fol. 52] the nature and requirements of all formal and informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations. . . . No person shall in any manner be requqired to resort to organization or procedure not so published."

II

The Commission has failed to comply with the requirements of section 3 of the Administrative Procedure Act, in that although it has published extensive rules and regulations pertaining to the practice and procedure of adjudicatory and rule-making proceedings, the only rule which it has published with regard to investigatory proceedings is section 1.10 of the Rules and Regulations of the Federal Communications Commission, which provides that "pro-

cedures to be followed by the Commission shall, unless specifically prescribed in this part, be such as in the opinion of the Commission will best serve the purpose of such proceeding." Said section 3 of the Administrative Procedure Act was and is applicable to the hearings and inquiry in issue.

THIRD AFFIRMATIVE DEFENSE

I

Respondents herein are not licensees of the Commission. The information sought to be ascertained from them by subpoena duces tecum and by oral interrogation constitutes business information which, in the highly-competitive television industry in which respondents function, is highly confidential and the disclosure thereof would constitute and give rise to irreparable injury to respondents and to the clients for whom they act in a representative capacity.

II

Further, the Commission has failed and neglected to [fol. 53] obtain authorization from the principals of respondents for respondents to disclose in a public record the business affairs of such clients.

III

The investigatory powers of the Commission do not give the Commission the right or power to cause the public disclosure of such details of the business methods, practices, policies of a business organization, not a licensee of the Commission, as to give its many competitors an undue business advantage.

IV

In the context of the circumstances here existing, the Commission was without power, right or authority to compel disclosure of the information in issue.

FOURTH AFFIRMATIVE DEFENSE

I

If the Commission is entitled to any part of the information it seeks to elicit from respondents, the Commission, under pertinent law, should then be required to take and maintain in confidence and as part of its non-public records, the information so sought to be elicited.

II

The failure and refusal of the Commission so to do, upon due and proper request from respondents, was arbitrary and improper.

FIFTH AFFIRMATIVE DEFENSE

I

The information sought to be elicited from respondents was unnecessary, immaterial and irrelevant to the subject matter of any proper, authorized or lawful field of inquiry by the Commission, and the subpoena in issue was unreasonable and oppressive.

Wherefore, answering respondents pray that the order to compel testimony be denied; that the petition be dis-
[fols. 54-168] missed; and that these respondents have such other and further relief as to the court may seem just and proper.

Dated, October 4, 1961.

Beilenson, Meyer, Rosenfeld & Susman, Allen E. Susman, Jeffrey L. Nagin, by Allen E. Susman, Attorneys for Respondents.

[fol. 169] BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D.C.

Docket No. 12782

In the Matter of: STUDY OF RADIO AND TELEVISION NETWORK BROADCASTING

MOTION BY MCA INC. AND TAFT B. SCHREIBER

The most recent order of the Commission, that of January 27, 1961, states that the orders made and procedures invoked by the Chief Hearing Examiner are interlocutory in nature and not appealable to the Commission. Accordingly, it would appear that a new motion must be made in this proceeding addressed to the Chief Hearing Examiner and we are now doing so. Mr. Schreiber is here awaiting the ruling on the motion.

We move as follows:

1. That the subpoena previously served upon Mr. Schreiber, insofar as it calls for the production of documents, be quashed and in any event limited so that item B thereof is of no force or effect.

2. That such subpoena, insofar as it calls for the personal appearance of Mr. Schreiber, be quashed.

3. That if the relief requested above be denied, then pending the outcome of Section 409 (g) enforcement proceedings ordered by the Commission in its January 27, 1961 order, the testimony of Mr. Schreiber be taken, as an interim matter, on a confidential basis in accordance with the procedures hereinafter set forth in detail.

[fol. 170] The motion we are now making is meritorious and should be granted for at least the following reasons:

a. The so-called "ground rules" established and applied by the Chief Hearing Examiner in this matter deprive Mr. Schreiber and MCA Inc. of the effective right to counsel afforded them by Section 6 (a) of the Administrative Procedure Act which, by federal law, this Commission is bound to apply.

The position heretofore taken by the Commission on this

point would clearly bring about an anamolous, unsound and unfair result. To illustrate: Section 6(a) of the Administrative Procedure Act states that a witness compelled to appear before various administrative agencies, including the FCC, has the right to be accompanied, represented and advised by counsel. As pointed out by the United States Court of Appeals very recently in *Backer* v. *The Commissioner*, 275 Fed. 2d 141, at page 143: "The Act says such counsel may accompany, represent and advise the witness *without any limitation.*" [Emphasis added]. The Congressional history of the Act, and a clear and direct opinion by the Attorney General of the United States in his Manual on the Administrative Procedure Act make it plain that the right to counsel under Section 6(a) is precisely what counsel for MCA and Mr. Schreiber sought to have afforded at the October hearings. The so-called "ground rules" imposed by the Chief Hearing Examiner severely restricted that statutory right and, in effect, made a nullity of the right to counsel provided by the controlling federal statute. Specifically, the Chief Hearing Examiner has laid down the "ground rule" unsupported by any authority and contrary to the applicable [fol. 171] statute, that a witness may talk to his attorney only after first asking permission of the Chief Hearing Examiner and only if such permission is then granted by the Chief Hearing Examiner. Then, if the lay witness has, by some rare chance, enough knowledge of applicable law to recognize the impropriety or inappropriateness of a question asked of him and if he is successful in obtaining permission from the Chief Hearing Examiner to talk to his attorney about it, the witness, and not the attorney, is then required to state the legal objections to the question and is subjected to further questioning about the legal objection raised, as has occurred previously in these hearings and is demonstrated by the record. The Chief Hearing Examiner forbids the attorney to speak, to state his client's position or to act as anything other than an ineffectual consultant; and then only if his client recognizes the need for, asks and gets approval for, consultation. This really reverses the functions of attorney and client, and a more ineffective application of the right to counsel would be difficult to conceive. For example, suppose an area of inquiry is clearly outside the jurisdiction of the FCC, and

assume hypothetically the matter is one over which the SEC alone has jurisdiction. Is Mr. Schreiber, or any other lay witness, supposed to know these voluminous, difficult and complex fields of law so thoroughly as to be able to detect the overreaching of jurisdiction so that he will ask to talk to his attorney? Or, as Congress intended to, and did, answer affirmatively in Section 6(a) of the Administrative Procedure Act, should Mr. Schreiber's attorney have the right to state affirmatively on the record—without being [fol. 172] charged with contumacy or impropriety—that the FCC lacks the jurisdiction in question? The "ground rules" imposed by the Chief Hearing Examiner, when their practical effect is examined, dispense with any effective legal restraint or limitation upon the activities and questioning of the FCC interrogator. To forestall and obviate so unjust a result, Section 6(a) of the Administrative Procedure Act, its Congressional history and its interpretation by the Attorney General give a witness in the position of our clients the right to counsel attempted to be employed here, but which when so attempted, was abruptly and completely refused.

Following the public hearings here in October of last year, the Commission's representatives advanced the argument that Section 6(a) of the Administrative Procedure Act did not apply to hearings of this nature and that, in effect, the Chief Hearing Examiner could make any rules he wanted to apply as he went along. That contention is, in our judgment, not only contrary to the pertinent authorities but, moreover, if the Commission were correct, would wipe out the salutary, beneficial and equitable purposes sought to be accomplished by the Administrative Procedure Act, would moreover eliminate any effective restraint on arbitrary Commission action, and would, in one fell swoop, wipe out the years of hard work put in by the American Bar Association and by dedicated students and members of government in their efforts to obtain by statute fair rules of procedure in the carrying on of federal administrative agency functions.

[fol. 173] b. The Commission has failed to observe, and has violated, the provisions of Section 3 of the Administrative Procedure Act requiring publication in the Federal Register of the rules applicable to hearings of this nature.

Section 3 of the Administrative Procedure Act requires every agency to publish its rules in the Federal Register. This requirement specifically applies to "statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available . . ." The Commission has promulgated no rules and regulations governing the conduct of investigatory proceedings. Without such rules and regulations, persons compelled to appear before the agency in such a proceeding have no prior knowledge of their rights or duties or of the procedure to be followed. For example, Part 1 of the Rules and Regulations governing the conduct of other hearings before the Commission spells out in great detail such matters as the nature of the right of counsel, the right to a transcript, the right to a pre-hearing conference, and the manner of preparing, signing and serving pleadings requesting relief, etc. In this proceeding persons compelled to appear are completely subject to the uncontrolled discretion of the presiding officer with respect to such matters and the many other subjects which are covered by the rules and regulations. Section 3 of the Administrative Procedure Act provides that "no person shall in any manner by required to resort to organization or procedure not so published.". The Commission's failure, therefore, to publish rules and regulations govern-[fol. 174] ing the conduct of investigatory proceedings means that MCA Inc. and Taft B. Schreiber cannot be compelled to appear and participate in the instant proceeding.

c. The order of the Commission of January 27, 1961, in so many words, countenances, seeks and calls for MCA Inc. and Mr. Schreiber to testify in a public hearing about the policies, practices and activities of MCA Inc. in connection with the production, casting, packaging, selection and sale of programs for television exhibition. This, in effect, would require MCA Inc., which is not a licensee of the Commission, to set forth in a public record every facet of its business which, in one way or another, could be construed to relate to or touch upon the television business. We respectfully maintain that the Commission lacks jurisdiction to require, and the permissible scope of inquiry of this hearing does not permit, the disclosure of valuable business know-how and experience and the accumulated

results of years of hard work under the American free enterprise system that are and have been factors of great significance in MCA's efforts to compete with the many other companies engaged in the same business as it. Whether the Commission is aware of the fact or not, it is requesting, and attempting to compel, MCA to furnish its many competitors with the formulas and knowledge that have contributed largely to such success as it enjoys in its business activities. Furthermore, the Commission is seeking to compel MCA to violate its duties and responsibilities to hold in confidence information pertaining to those per- [fol. 175] sons and entities for whom MCA acts in a representative capacity. If testimony is called for in this area, it should come from the principal and not the agent.

If the Commission possessed in fact and in law the power and authority it now claims to possess, and seeks to use against MCA, the implications would be staggering. It must be remembered that MCA is not subject to FCC regulation. It is not an FCC licensee. Under the theory advanced by the Commission, every company which sponsors a television program could be compelled to appear before the Commission and tell all of its competitors and everyone else the procedures employed in its business and the reasons why it conducts its business as it does, or, to use the language of the Commission's recent order—all of its policies, practices and activities. In our considered opinion, there is no such right or power in the Commission, nor should there be.

d. The Commission refused, and on the record before us, will continue to refuse to permit the information sought to be obtained from MCA to be maintained in confidence by the FCC. The Commission's own opinion recognizes, as did the United States District Court in New York several years ago, in the case of *FCC* v. *Cohn,* 154 Fed. Supp. 899, that a need exists for the retention by the Commission in confidence of information required by it to be furnished to it and which, if made public, would unnecessarily cause substantial damage to companies engaged in a highly competitive industry. Yet, although the Commisison here seeks to embark upon an extensive probe into the details of MCA's [fol. 176] business—and has already placed in the record

more detailed financial and other information concerning MCA than of any other non-licensee company whose representatives have testified—it categorically refuses to maintain MCA's confidential business information in confidence. This, we believe, is contrary to applicable law and imposes an unnecessary burden upon, and injury to, MCA.

e. The legal issues we have advanced are important and substantial and, to a large extent, have never been decided by the courts. We believe they should be so decided and, as brought out in the leading cases of *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, and *Guarantee Underwriters Inc.* v. *Johnson,* 133 Fed. 2d 54, decided respectively by the United States Supreme Court and the Court of Appeals, a witness compelled to appear before a federal administrative agency is entitled to have the courts decide important questions of the kind here involved prior to the exercise by the Commission of its compulsive powers. That principle is, of course, observed and enunciated under the precise provisions of Section 409 (g) of the Communications Act and is, moreover, acknowledged by the Commission itself in its order of January 27, 1961, which states that if my clients adhere to the legal position expressed by them, the Commission will institute an immediate enforcement action to have the court determine whether the Commission's position or ours is correct.

[fol. 177] f. In order to eliminate unnecessary and unimportant procedural steps, and in the interests of expediting this matter and conserving public funds and the time and energy of all concerned, we requested the Commission by letter dated February 10, 1961, to dispense with the present hearings pending a court determination of the important and novel legal questions here involved. A copy of the letter of February 10, 1961, which we sent the Commission in that regard, is attached hereto. That request, reasonable and sensible as it is, was denied by the Chief Hearing Examiner last week. We renew the suggestions made in that letter and urge their acceptance. We are entirely willing on behalf of our clients to enter into all appropriate and fair stipulations and to cooperate fully with the Commission's representatives in an effort to expedite the obtain-

ing of a definitive and final adjudication by the courts in keeping with the spirit and intent of Section 409 (g) of the Communications Act.

g. My clients desire to suggest to the Chief Hearing Examiner a procedure to be followed here, which will save everyone time, effort and money and will sacrifice no rights. We propose and offer that Mr. Schreiber testify as to all appropriate and proper questions in accordance with the following procedure:

1. As an interim matter and pending the decision of the courts, the hearing will be non-public and the transcript made shall be kept confidential.

[fol. 178] 2. Mr. Schreiber shall have the right to be accompanied, represented and advised by counsel in accordance with the position previously expressed by us.

3. Following the conclusion of Mr. Schreiber's testimony, the record will be sealed pending the outcome of the 409 (g) enforcement proceedings. If, as a result of such proceedings, all of the points raised by MCA Inc. and Mr. Schreiber are denied by the courts, the record heretofore made will, without the necessity of further action, be unsealed and will be available for public inspection. However, if the position of MCA is sustained by the courts, the material heretofore furnished in accordance with this procedure will remain in the non-public part of the docket in this proceeding.

h. Let us say again, as has been said before by our clients in their testimony, briefs, petitions and other documents submitted to the Commission, that they have never refused, nor do they now refuse, to testify in this proceeding. What they seek, and have a right to obtain, is to have such testimony and their records produced and elicited in conformance with the provisions of applicable federal law, within the boundaries of the jurisdiction and authority of this Commission and, when unnecessary injury to our clients in its business and unnecessary advantage to their many and vigorous competitors will result from public disclosure of trade secrets and confidential data embodied in our clients' policies, practices and activities, to have such testimony and records maintained in confidence by this Commission.

[fol. 179] Although we are of the firm belief and sincere

and strong conviction that the legal position we have advanced in this hearing is correct and in accordance with the governing law on the subject, should it be finally determined otherwise by court decision, we wish the record to show that our clients will abide by the decision of the courts, whatever that decision may be. The Commission should do no less and should be willing, we think, to state that fact publicly and openly at this time.

We accordingly and respectfully move that the motion advanced on behalf of our clients be granted.

Respectfully submitted, Allen E. Susman, Beilenson, Meyer, Rosenfield & Susman, Citizens National Bank Building, 9350 Wilshire Boulevard, Beverly Hills, California. Harry M. Plotkin, Berge, Fox & Arent, 1002 Ring Building, Washington 6, D. C., Counsel for MCA Inc. and Taft B. Schreiber.

March 8, 1961.

[fol. 180] (Letter Head of)

BEILENSON, MEYER, ROSENFELD & SUSMAN

February 10, 1961

Federal Communications Commission
Washington, D. C.

Re: Docket No. 12782—In the Matter of Study of Radio and Television Network Broadcasting

Gentlemen:

As your files reflect, this office, in association with the firm of Berge, Fox & Arent, is counsel for MCA Inc. and Mr. Taft B. Schreiber in the above mentioned proceeding.

We have received the order of the Commission released February 3, 1961 stating that the proceeding is to be reconvened at ten o'clock A.M., Wednesday, March 8, 1961 at Los Angeles.

We respectfully suggest and strongly recommend that the public interest would be served, and substantial public funds

conserved, if the Commission and MCA Inc. and Mr. Schreiber enter into a stipulation to the following effect:

1. Each of them maintains and adheres to the position taken by each at the hearings of the Commission held in Los Angeles, California between October 10, 1960, and October 25, 1960, and expressed in their respective Petitions and Memoranda.

2. Each of them agrees that the proceedings scheduled for reconvening on March 8, 1961 in Los Angeles, California need not be had and if the Commission institutes proceedings in the United States District Court to attempt to enforce the subpoena and orders in issue, we are willing to waive any objection to the effect that the proceedings of March 8, 1961 have been dispensed with.

[fol. 181] Putting the matter succinctly, we are suggesting and urging that the legal rights of the respective parties be preserved, and that it be stipulated that all formalities necessary to a court determination of the matters in dispute between the parties (which, as the various petitions and memoranda indicate, are legal questions of substance) have been complied with.

The procedure we are here suggesting will have the following salutary effects:

1. The Commission, if it so desires, may proceed forthwith in the United States District Court to attempt to obtain an order from the court requiring compliance by MCA Inc. and Mr. Schreiber with the orders and subpoena in issue.

2. A substantial saving of time, effort and public moneys will be had.

3. Both the Commission and our clients will have the opportunity to obtain a determination by the appropriate tribunal of the merits of their respective positions more quickly and more expeditiously than if an intervening and unnecessary intermediate hearing is had.

4. Since the questions in dispute present, in major part, novel and important questions relating to the rights and obligations of those subpoenaed to appear before the Commission, it seems particularly appropriate and highly in the public interest that all possible technicalities be dis-

pensed with and that the way be cleared to obtain a definitive and speedy determination as soon as possible.

I have been notified and authorized by Mr. Oliver B. Schwab, counsel for Dick Fishell, Betty Langley, Mary Rothschild, Dick Fishell & Associates, and Promotions, Unlimited, to state that his clients concur in this letter and also desire to enter into a like stipulation with respect to their position.

[fols. 182-233] Your prompt response to this letter will be appreciated. We will be pleased to meet with counsel for the Commission or any other Commission representatives in Los Angeles or in Washington to work out the precise language of the suggested stipulation.

Very truly yours, /s/ Allen E. Susman.

AES/ag

cc: James D. Cunningham, Esq., Chief Hearing Examiner; Ashbrook Bryant, Esq., Oliver B. Schwab, Esq.

[fol. 234] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 1258-61-Y

FEDERAL COMMUNICATIONS COMMISSION, Petitioner,

vs.

TAFT B. SCHREIBER, AND MCA, INC, Respondents.

APPEARANCES:

For Petitioner: Francis C. Whelan, Esquire, United States Attorney, By: Frederick M. Brosio, Jr., Esq., Assistant U. S. Attorney, Los Angeles, California.

For Respondents: Beilenson, Meyer, Rosenfeld & Susman, By: Allen E. Susman, Esq. and Jeffrey L. Nagin, Esq., Beverly Hills, California.

OPINION—Filed January 22, 1962

[fol. 235] YANKWICH: District Judge:

By the Complaint, the Petitioner, the Federal Communications Commission, hereinafter referred to as "the Commission", seeks the enforcement of subpoenas and orders pursuant to §§ 401(a), 401(b), 409(f) and 409(g) of the Communications Act of 1934, (47 U.S.C.A., §§ 401(a), 401(b), 409(f), 409(g)) in effect, commanding the respondents, MCA, Inc., a corporation organized and doing business under the laws of the State of Delaware, and Taft B. Schreiber, an individual, both with offices and place of business located at 9370 Santa Monica Blvd., Beverly Hills, California, to be referred to as "the Respondents", to appear before the Commission at a time and place to be subsequently determined by it and to bring with them and to produce certain books, papers and documents as required by a subpoena *duces tecum* lawfully issued by the Commission on October 17, 1960 and duly served upon respondent S. Schreiber and the orders of the Commission released Jan-

uary 27, 1961, and February 3, 1961, also duly served upon respondents.

The power of the Commission to institute investigations of the type now before it, seeking to determine whether certain practices are being indulged in in programming television, has long been sustained. A succinct statement of the principle is contained in Stahlman v. Federal Communications Commission, 1941, 126 F.2d 124, 128:

> "* * * the Commission may, without interference seek through an investigation of its own making information properly applicable to the legislative standards set up in the Act. We should not assume that the investigation [fol. 236] will be conducted for any other purpose, or in disregard of the constitutional limits which govern such procedure." (p. 128)

The courts have applied the same reasoning to this and other agencies in sustaining pre-complaint investigatory subpoenas. (See, Federal Trade Commission v. National Biscuit Company, 1937, 18 F.Supp. 667, 671; Federal Communications Commission v. Cohn, 1957, 154 F.Supp. 899, 906; Hunt Foods and Industries, Inc., v. Federal Trade Commission, 9 Cir., 1960, 286 F.2d 803, 808-809, affirming the writer's opinion in Federal Trade Commission v. Hunt Foods and Industries, Inc., 1959, 178 F.Supp. 448)

From the cases just cited, and from the Complaint and the supporting documents filed by the Commission, it is apparent that the inquiry sought here is clearly within the investigatory powers of the Commission. The objections of the respondents that their counsel was not allowed to *cross-examine* witnesses is without merit. In a noted decision, Hannah v. Larche, 1960, 363 U.S. 420, the present Chief Justice, in considering the scope of the investigatory powers of various administrative commissions, said this of the meaning of the right to counsel in proceedings before administrative agencies:

> "A typical agency is the Federal Trade Commission. Its rules draw a clear distinction between adjudicative proceedings and investigative proceedings. 16 CFR, 1958 Supp., §1.34. Although the latter are frequently

initiated by complaints from undisclosed informants, id., §§ 1.11, 1.15, and although the Commission may use [fol. 237] the information obtained during investigations to initiate adjudicative proceedings, id., § 1.42, nevertheless, persons summoned to appear before investigative proceedings are entitled only to a general notice of 'the purpose and scope of the investigation,' id., § 1.33, and while they may have the advice of counsel, 'counsel may not, as a matter of right, otherwise participate in the investigation.' Id., § 1.40. The reason for these rules is obvious. The Federal Trade Commission could not conduct and efficient investigation if persons being investigated were permitted to convert the investigation into a trial. We have found no authorities suggesting that the rules governing Federal Trade Commission investigations violate the Constitution, and this is understandable since any person investigated by the Federal Trade Commission will be accorded all the traditional judicial safeguards at a subsequent adjudicative proceeding, just as any person investigated by the Civil Rights Commission will have all of these safeguards, should some type of adjudicative proceeding subsequently be instituted." (p. 446)[1]

The proceeding before the Commission is clearly *investigatory*. It is not an *adjudicatory* proceeding of the type governed by § 409 of Title 47. To be more specific: As alleged in the Complaint, the boject of the investigation carried on by the Commission was

> [fol. 238] "to determine, principally, whether the television networks, Commission licensees, or others may be arbitrarily restricting or excluding the broadcast of otherwise meritorious programs or advertising material."

In its Order of February 27, 1959, the Commission determined that to answer the question in an adequate manner it was necessary to make a comprehensive fact-finding investigation into the daily operation of the industry in the creation and selection of programs and advertising for television exhibition. The subpoena issued and served on the respondents on October 17, 1960, before James D. Cunningham,

Chief Hearing Examiner, ordered the respondents to appear and produce certain documents. These were listed in "Annex B", which is printed in the margin,[2] and which required them to produce, at the time and place, the books, papers and documents therein described. In sum, "Annex B" of the Commission's subpoena seeks a list of all television programs in which respondent MCA, Inc. has acted as "packager",[3] and which were exhibited over the three major television networks since September 1, 1958. These were reasonably relevant to the inquiry. (Mines and Metals Corp. v. Securities & Exchange Commission, 9 Cir., 1952, 200 F.2d 317, 321; Detweiler Bros. v. Walling, 9 Cir., 1946, 157 F.2d 841; United States v. Woerth, D.C. Iowa, 1956, 130 F.Supp. 930, 937-939)

To use the language which the Supreme Court applied to the Federal Trade Commission,

> [fol. 239] "Its broad power of investigation and subpoena prior to the filing of a complaint" (Automatic Canteen Co. v. Federal Trade Commission, 1953, 346 U.S. 61, 79)

is beyond challenge. The fact that the respondents were not licensees of the Commission did not prevent it from seeking information from them. As said in Federal Communications Commission v. Cohn, D.C.N.Y., 1957, 154 F.Supp. 899, 906:

> "In furtherance of its powers to investigate, the Commission has been granted full power of subpoena, 47 U.S.C.A., § 409(e). *This power is, of course, not confined to those over whom it may exercise regulatory jurisdiction, but to any persons from whom it can obtain information and documents which are relevant and material to its inquiry.* The argument of the respondents that they are exempted from the subpoena power of the Commission because the Commission has no regulatory power over them, *would be wholly inconsistent with the broad powers of investigation with which the Commission is vested and would circumscribe such power so as to severely restrict its effectiveness.* There is no doubt that administrative agencies vested with such powers may, by compulsory process, require the production of information and documents from

third persons who are not within their regulatory jurisdiction if the information sought is necessary and rele-
[fol. 240] vant to their authorized and lawful inquiry."

No disclosure is sought of business costs, profits and losses. These facts are not in dispute, but the respondents attack the power of the Commission to make the inquiry and object to what might be called "the methodology" of the Commission in limiting this right to counsel and in other respects. The power to investigate and the right to counsel have already been treated fully. We consider the other objections briefly.

The complaint that the Commission has not promulgated "ground rules" as required by the Administrative Procedure Act (5 U.S.C.A., §§ 1002-1003) is not well taken. It is doubtful if the provisions of that Act apply to any but adjudicating agencies. (Hannah v. Larche, supra, pp. 452-453) Furthermore, there is evidence in the record showing that rules have been promulgated which are suited to the needs of the Commission.[4] At any rate, unless and until an adjudicative stage is reached, the failure to make rules becomes an abstract question which need not be decided now. Failure to do so does not prejudice the respondents. However, I am of the opinion that in view of the well-grounded fears of the respondents that the testimony to be given might result in disclosure of trade-secrets, of which competitors might take advantage, it is suggested that the Examiner confine attendance at the hearing to the persons directly involved in the proceedings, their counsel, experts and witnesses and *exclude the general public.*

At the hearing the Court reserved, as usual, its right to
[fol. 241] call for additional oral arguments. The matter has been pending for several months. In addition to the oral arguments already had extensive briefs have been filed. In the circumstances, the Court feels that no additional oral argument is necessary.

The respondents, MCA, Inc. and Taft B. Schreiber, are hereby ordered to appear before a Presiding Officer duly appointed by the Commission at a time and place to be fixed by the Commission, to testify and to produce books, papers and documents in accordance with the above-mentioned subpoena and orders issued by the Commission and duly served

upon the respondents. Jurisdiction will be retained by the Court for any subsequent proceedings consequent upon the order. (Hunt Food and Industries, Inc. v. Federal Trade Commission, 9 Cir., 1960, 286 F.2d 803, 813)

Formal findings and Order to be prepared by counsel for the Commission under local Rule 7.

Dated this 22nd day of January, 1962.

Leon R. Yankwich, Judge.

[fol. 242] NOTES TO TEXT

1. This statement of our highest court dispells the contrary argument derived by respondents from the rulings of the courts in United States v. Smith, D.C.Conn., 1949, 87 F.Supp. 293 and Hacker v. Commissioner, 5 Cir., 1960, 275 F.2d 141, 144. On close analysis these cases do not help the respondents.

In *Smith,* officers of a corporation summoned before an Internal Revenue agent to testify concerning a corporate tax return declined to testify because their attorney was not allowed to be present. The court enforced the subpoena, but ordered that the attorney be permitted to be present. Whatever language may have been used as to the application of §6(a) of the Administrative Procedure Act (5 U.S.C.A., §6(a)) is foreign to the issue before us. Indeed, that section especially allows counsel to be present. More, the court stated by their presence counsel were merely to "advise upon their constitutional rights". (p. 294)

In *Hacker,* the employee of a taxpayer, an accountant, was summoned before an Internal Revenue agent to testify concerning the latter's income. He appeared with the taxpayer's counsel. The agent refused to allow the attorney to appear. The action of the trial court in not allowing the taxpayer's attorney to appear, in deference to a departmental regulation, was reversed on appeal.

In sum, what the courts were deciding was not *the scope of inquiry* in administrative proceedings, but they were merely sustaining the right to counsel in some definite pro-
[fol. 243] ceedings under the tax statutes. Here, the re-

spondents were allowed the benefit of advice of counsel. Counsel were denied the right to participate *directly* in the proceedings by cross-examination of witnesses. The cases cited in the text fully sustain the ruling.

2. "(B) A list of all television programs whether series programs, special programs, or otherwise, which appeared on or were exhibited by or through the facilities of the television networks of NBC, CBS, or ABC, since September 1, 1958, in which MCA, Inc. or any predecessor affiliate or subsidiary of MCA, Inc. acted as packager and/or, by agreement or otherwise, is entitled to receive or has received a percentage of the cost or selling price of said program or was or is entitled to receive or has received other compensation, remuneration or fees in connection with the packaging, licensing for broadcast or selling of said program, otherwise than as remuneration or compensation for the representation as agent of individual natural persons as talent."

3. The term "packaging" is generally applied to the process of developing and assembling the talent and scripts for a particular program or programs. A producer has general charge of the physical processes by which the package is readied for television production.

4. See, § 1.10 of the Commission's Rules and Regulations, 47 C.F.R., § 1.10 and thirteen special orders issued in the [fols. 244-267] present proceeding, and published. See, 24 F.R. 1605, 2918, 3060, 5122, 5726, 9275, 9377; 25 F.R. 2116, 6998, 7552; 26 F.R. 992, 1194, 4462.

[fol. 268] Filed March 1, 1962, Clerk, U.S. District Court, Southern District of California

BEILENSON, MEYER, ROSENFELD & SUSMAN
9350 Wilshire Boulevard
Beverly Hills, California.

Allen E. Susman, Jeffrey L. Nagin, Attorneys for Respondents.

CRestview 1-9146
BRadshaw 2-0726

Entered March 1, 1962, Clerk, U.S. District Court, Southern District of California

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

Civil No. 1258-61-Y

FEDERAL COMMUNICATIONS COMMISSION, Petitioner

v.

TAFT B. SCHRIEBER, AND MCA, INC., Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The above-entitled matter having come on regularly for hearing on October 4, 1961, on the Order to Show Cause issued on September 22, 1961, why this Court should not grant the Petition for Enforcement of a Subpoena and Orders of the Federal Communications Commission filed on September 22, 1961, and enter an order or orders directing the production of documentary evidence and the giving of testimony as required by said subpoena and orders, before the Honorable Leon R. Yankwich, United States District Judge, Francis C. Whelan, United States Attorney by Jack F. Blair, Assistant United States Attorney, Asst. Chief, Civil Division and Frederick M. Brosio, Jr., Assistant United States Attorney, having appeared as counsel for petitioner; Beilenson, Meyer, Rosenfeld & Susman, by Allen E. Susman and Jeffrey L. Nagin, having appeared as counsel for respondents Taft B. Schreiber and MCA, Inc.; docu-

[fol. 269] mentary evidence having been submitted; the matter having been argued orally and the matter having been taken under submission subsequent to the filing of written memoranda by petitioner and respondents subsequent to the hearing held on October 4, 1961, and the Court being fully advised in the premises, the Court makes the following Findings of Fact, Conclusions of Law, and Order.

Findings of Fact

I

By the Complaint, the petitioner, the Federal Communications Commission, hereinafter referred to as "the Commission", seeks the enforcement of a subpoena and orders issued by the Commission in an investigation pursuant to §§401(a), 401(b), 403, 409(f) and 409(g) of the Communications Act of 1934, 47 U.S.C. §§401(a), 401(b), 403, 409(f), 409(g), in effect, commanding the respondents, MCA, Inc., a corporation organized and doing business under the laws of the State of Delaware, and Taft B. Schreiber, an individual, both with offices and place of business located at 9370 Santa Monica Boulevard, Beverly Hills, California, to be referred to as "the respondents", to appear before the Commission at a time and place to be subsequently determined by it and to bring with them and to produce certain books, papers and documents as required by a subpoena duces tecum lawfully issued by the Commission on October 17, 1960, and duly served upon respondent Schreiber, and required by the orders of the Commission released January 27, 1961, and February 3, 1961, also duly served upon respondents.

II

The subpoena and orders which the Commission seeks to enforce were issued in an investigatory proceeding being conducted by the Commission pursuant to Section 403 of the Communications Act of 1934, as amended (47 U.S.C. §403). That proceeding was initiated by an order of Febru- [fol. 270] ary 27, 1959 (24 F.R. 1605 which directed that inquiry be made to determine the policies and practices pursued by networks and others in the acquisition, ownership, production, distribution, selection, sale and licensing

of programs for television exhibition and the reasons and necessity in the public interest for said policies and practices. It further ordered that, for the purpose of the investigation, FCC Chief Hearing Examiner James D. Cunningham would constitute a board within the meaning of Section 5(d) of the Communications Act of 1934, as amended (47 U.S.C. §155(d)) and that he convene, conduct and carry on said proceeding at such times and places as he should determine would best facilitate the dispatch of the business of said proceeding and serve the ends of justice; that he preside over the proceeding, receive evidence, make a record thereof, and certify that record to the Commission; and in connection with said investigatory proceeding, James D. Cunningham, sitting as a board and Presiding Officer, as aforesaid, be authorized and empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence and require the production of books, papers, correspondence, memoranda and other records deemed relevant to the inquiry and to perform all other duties in connection therewith as authorized by law. It was further ordered that the investigatory proceeding be a public proceeding except that the Presiding Officer was empowered to order non-public sessions where and to the extent that he should determine that the public interest, the proper dispatch of the business of said proceeding, or the ends of justice would be served thereby.

III

On November 10, 1959, the Commission isused a Supplemental Order for Investigatory Proceeding (FCC 59-1136, 24 F.R. 9275) in which it ordered and directed that the pro- [fol. 271] ceeding be amended and enlarged to determine the policies, practices, mechanics and surveillance pursued and carried out by networks, station licensees and others in connection with the acquisition, ownership, production, distribution, selection, sale and licensing of programs for radio and television exhibition and the policies and practices pursued by networks, station licensees and others in connection with the selection, presentation and supervision of advertising material for broadcast to the public and the reasons and necessity in the public interest for said policies and practices, and activities.

IV

From October 10 through October 25, 1960, public sessions of the inquiry were held in Los Angeles, California, and were devoted to the receiving of testimony and other evidence concerning the activities, functions, policies and practices of a number of Hollywood-centered television production companies, talent agencies, talent representatives, program packagers and sales representatives as well as West Coast representatives of the National Association of Broadcasters, and several principal officers of Guilds which act as collective bargaining agents for performing and other talent in television programming. Also heard were representatives of companies and individuals who engaged in the business of seeking to promote various products and services as a part of the subject matter of television programming.

V

On October 17, 1960, the Presiding Officer issued a subpoena duces tecum directed to respondent Taft Schreiber, Vice-President of MCA, Inc., commanding him to appear and produce certain documents described in an annex attached to the subpoena. On October 21, 1960, Respondent MCA, Inc., appeared before the Commission by the respondent Schriber who was accompanied by counsel. He was allowed to consult with counsel on his own initiative. [fol. 272] Schreiber produced the material demanded by Annex A of the subpoena. He refused to submit the material demanded in Annex B, which included a list of the programs as to which MCA, Inc., was a "packager," although he admittedly had such a list in his possession in the hearing room. When directed to produce the document by the Presiding Officer, and to testify fully regarding it, Schreiber refused unless the Commission agreed to accept the material as confidential. The Presiding Officer refused to accept the documents under such conditions.

VI

Respondents applied to the Commission pursuant to Section 5(d)(2) of the Communications Act (47 U.S.C. §155(d)(2)) for review of the rulings and orders of the

Presiding Officer. The Commission concluded upon review that the rules, orders and directions of the Presiding Officer were clearly valid and proper and within his authority as set forth in the Commission's Orders of February 27, 1959, and November 10, 1959. The Commission also concluded that the refusal to testify and produce the required information and data was without warrant in law and seriously impeding and frustrating the Commission's purposes as stated in its orders issued in the proceeding.

VII

The Presiding Officer was ordered by the Commission to reconvene the hearing and respondents were commanded to appear before the said Presiding Officer at such time and place as he may designate and to testify as he may direct in the instant proceeding regarding all matters deemed to be relevant to this inquiry; and to produce all of the information and data required by the subpoena and such other information and data as may be deemed relevant and ordered or directed to be produced by the said Presiding Officer; "all evidence, information and data deemed rele-
[fol. 273] vant by the Presiding Officer to be produced or provided as directed herein shall be included in the public record of these proceedings *except* in those instances where the Presiding Officer orders that evidence, information or data be produced on non-public basis as provided by our Orders in these proceedings. In the event the Presiding Officer so acts, such evidence, information, and data shall not be publicly disclosed except by direction of the Commission; . . . that in the event that the said persons or any of them shall fail to appear as directed, or having appeared shall fail fully to comply with this Order, or shall fail to testify and produce the information and data as required by said subpoenas or by order or direction of the Presiding Officer herein, that an action be filed forthwith in the appropriate United States District Court to enforce compliance with said subpoenas and with the provisions of this Order."

VIII

The Presiding Officer released an Order on February 3, 1961, designating that the investigatory proceeding be reconvened on March 8, 1961, at Los Angeles, California, and ordering respondents to appear and to testify in the proceeding in accordance with the aforementioned order of the Commission. These orders were duly served upon the respondents.

IX

The proceeding was reconvened in Los Angeles as ordered on March 9, 1961, and counsel for respondents moved that the subpoena be quashed or, in any event, limited so that Annex B would have no force or effect; that the subpoena be quashed insofar as it calls for the personal appearance of Taft Schreiber and that if the relief requested above be denied, then, pending the outcome of the enforcement proceedings ordered by the Commission in its January 27, 1961 [fol. 274] order, the testimony of Mr. Schreiber be taken, as an interim matter, on a confidential basis in accordance with certain detailed procedures.

X

After hearing argument of counsel for respondents, the Presiding Officer found that the subpoenas were valid in every respect; that the evidence elicited is essential to the proceeding and to the success of the investigation; that the Commission's authority to make its inquiry is well established; that the Presiding Officer was under a mandate from the Commission to hold public sessions except in the case of extraordinary instances and that any private competitive interest here involved must be subordinated to the public interest of the Commission securing the full facts. He thereupon denied the motion and directed Respondent Taft B. Schreiber to take the stand and be sworn. The respondent was so sworn and stated as follows:

"The Witness: Mr. Cunningham, Your Honor, Mr. Bryant, for the reasons stated in the petition and motion that was filed in my behalf, and in behalf of my company, and upon advice of counsel I cannot and will not

answer any questions in this regard, and not until the Court acts upon the propriety of this position will I give answer to any of these statements."

The Presiding Officer then directed Commission Counsel to proceed to examine the witness. Counsel proceeded to propound questions which the respondent refused to answer, whereupon the examination was suspended pending a reference of the matter to the District Court for enforcement of the subpoena and orders.

XI

The record herein, including but not limited to, the testimony in the extensive hearings held by the Commission in [fol. 275] its network programming inquiry, make it necessary that in protection of respondents' rights and to preclude disclosure of trade secrets of which competitors might take advantage, all further interrogation of, and all further testimony given by, respondents shall be given in non-public sessions, and shall be retained and maintained in confidence by the Commission.

XII

The ground rules promulgated by the Hearing Examiner with respect to the right of respondents to be accompanied, represented and advised by counsel included the following:

Counsel for a witness could not, during the course of the interrogation of his client, take exception to any question, request clarification thereof, make any legal objection thereto, initiate any consultation with his client, or utter any words whatsoever which might appear on the record; further, under such ground rules consultation between witness and counsel not only had to be initiated by the client, but in addition, the Hearing Examiner reserved the right to pass on all requests for consultation and to approve or deny the same and the Hearing Examiner did in fact deny such request on at least one occasion.

Conclusions of Law

I

This Court has jurisdiction of the cause.

Communications Act of 1934, as amended, Sections 401(a), 401(b), 409(g);

47 U.S.C. §§401(a), 401(b), 409(g).

II

The Commission is authorized to conduct the instant investigation.

Communications Act of 1934, as amended, §403, 47 U.S.C. §403;

[fol. 276] *Federal Communications Commission* v. *Cohn*, 154 F. Supp. 899, 906 (S.D. N.Y. 1957).

III

The Commission has authority to issue the subpoena and orders sought to be enforced in this proceeding.

Communications Act of 1934, as amended, §§409(e), (f), 47 U.S.C. §§409(e) (f);

Stahlman v. *Federal Communications Commission*, 126 F. 2d 124, 128 (D. C. Cir. 1941);

Federal Communications Commission v. *Cohn*, 154 F. Supp. 899, 906 (S.D. N.Y. 1957);

See: *Hunt Foods & Industries, Inc.* v. *Federal Trade Commission*, 286 F. 2d 803, 808-809 (9th Cir. 1960) aff'g. the opinion in *Federal Trade Commission* v. *Hunt Foods & Industries, Inc.*, 178 F. Supp. 448 (S.D. Cal. 1959);

Federal Trade Commission v. *National Biscuit Company*, 18 F. Supp. 667, 671 (S.D. N.Y. 1937).

IV

Complementing its investigative power, the Commission is authorized by Sections 4(i), 303(f) and 303(g) of the Communications Act (47 U.S.C. §§154(i), 303(f), and 303(g)) to perform any and all acts, make such rules and

regulations, issue orders not inconsistent with the Communications Act, as may be necessary in the execution of its [fol. 277] functions and generally to encourage the larger and more effective use of radio in the public interest. Section 303(i) of the Communications Act (47 U.S. C. §303(i)) authorizes the Commission to make special regulations applicable to radio stations engaged in chain broadcasting as the public interest, convenience, or necessity require.

V

The Commission is required to report to Congress information and data considered of value in the determination of questions connected with the regulation of broadcasting and to make specific recommendations to Congress as to additional legislation which the Commission deems necessary or desirable (Communications Act, Section 4(k), 47 U.S.C. §154(k)).

VI

The Commission was authorized by Sections 5(d)(1) and 5(d)(2) of the Communications Act (47 U.S.C. §155(d)(1)) to designate its Chief Hearing Examiner, Mr. James D. Cunningham, to preside over the taking of evidence in that phase of the investigatory proceeding pertinent to this cause.

VII

Under §6(a) of the Administrative Procedure Act, respondents were not entitled to cross-examine witnesses testifying in these hearings. Respondents were and are, however, entitled to the following:

(a) The right to have counsel accompany respondents when testifying;

(b) The right to have respondents' counsel object to any questioning by the Commission, its counsel or Hearing Examiner deemed improper by respondents' counsel.

(c) The right to have counsel for respondents present on [fol. 278] the record concise grounds and reasons for any such objection.

(d) The right to have counsel for respondents, without interference by the Commission, its counsel or Hearing Examiner, initiate advice to his client with respect to the propriety or legality of any question asked of his client and

to advise his client not to answer any such questions deemed improper.

VIII

The information requested in "Annex B" of the Commission's subpoena is reasonably relevant to the inquiry being conducted by the Commission.

Mines & Metals Corp. v. *Securities and Exchange Commission*, 200 F. 2d 317, 321 (9th Cir. 1952);
Detweiler Bros. v. *Walling*, 157 F. 2d 841 (9th Cir. 1946);
United States v. *Woerth*, 130 F. Supp. 930, 937-939 (N.D. Iowa 1956).

IX

The Federal Communications Commission possesses a broad power of investigation and subpoena, and the fact that the respondents were not licensees of the Commission did not prevent it from seeking the required information from them.

Federal Communications Commission v. *Cohn*, 154 F. Supp. 899, 906 (S.D. N.Y. 1957);
Stahlman v. *Federal Communications Commission*, 126 F. 2d 124, 128 (D.C. Cir. 1941).

[fol. 279]

X

The alleged failure of the Commission to promulgate adequate ground rules to cover the proceeding did not prejudice respondents.

Administrative Procedure Act, Section 10(e), [5 U.S.C. §1009(e)].

XI

The subpoena and order duly served upon respondents in this proceeding are in all respects valid, and respondents are in disobedience of the same.

XII

This Court has the power to retain jurisdiction for any subsequent proceedings consequent upon the Order issued.

Hunt Food & Industries, Inc. v. *Federal Trade Commission*, 286 F. 2d 803, 813 (9th Cir. 1960).

In accordance with the Findings of Fact and Conclusions of Law:

1. It is Hereby Ordered that respondents, MCA Inc. and Taft B. Schreiber, are hereby ordered to appear before a Presiding Officer duly appointed by the Federal Communications Commission at a time and place to be fixed by the Commission, to testify and to produce books, papers and documents in accordance with the subpoena issued and served upon the respondents on October 17, 1960, and orders issued by the Commission and duly served upon the respondents.

2. It is Further Ordered that any further interrogation of respondents and any documents produced by respondents be taken and held by the Commission in private and confidential session, that the public be excluded therefrom, that all testimony adduced and documents produced be maintained in confidence by the Commission, that the Commission by motion duly made and served, may move the Court upon the conclusion of such interrogation and production for an [fol. 280] order, should good cause exist therefor, permitting such testimony and documents to be made public, and that respondents shall retain the right to oppose such motion if and when so made.

3. It is Further Ordered that in the course of any further interrogation of respondents:

a) Counsel for respondents shall not be entitled to cross-examine witnesses;

b) Respondents shall have the right to have counsel accompany respondents when testifying, the right to have respondents' counsel object to any questioning by the Commission, its counsel or the Hearing Examiner deemed improper by respondents' counsel, the right to have counsel for respondents present on the record concise grounds and reasons for any such objection, and the right to have counsel for respondents, without interference by the Commission, its counsel or the Hearing Examiner, initiate advice to his client with respect to the propriety or legality of any question asked of his client and to advise his client not to answer any such question deemed improper.

c) If respondents decline to answer any questions upon advice of counsel or otherwise, the propriety of all such

questions shall be ruled upon by this Court upon appropriate motion by any of the parties hereto, and respondents shall not be deemed to be in contempt either of this Court or of the Commission or suffer or incur any penalty until and unless the Court has ruled in favor of the propriety of any such questions and respondents thereafter refuse or decline to answer the same.

4. It is Hereby Ordered that the Order of this Court shall be, and it is hereby, stayed during and throughout the period within which an appeal may be taken from such Order, and, if an appeal be taken therefrom, such stay shall remain in effect during and throughout the period of the pendency of the appeal.

[fols. 301-304] 5. The Court retains jurisdiction of this cause for any subsequent proceedings consequent upon this order.

Dated, March 1, 1962.

Leon R. Yankwich, United States District Judge.

Presented by: Beilenson, Meyer, Rosenfeld & Susman, Allen E. Susman, Jeffrey L. Nagin, by Allen E. Susman, Attorneys for Respondents.

[fol. 305] IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17,990

FEDERAL COMMUNICATIONS COMMISSION, Appellant—Cross-Appellee,

vs.

TAFT B. SCHREIBER and MCA, INC., Appellees—Cross-Appellants

An Appeal from the United States District Court for the Southern District of California Central Division

OPINION—February 17, 1964

Before: JERTBERG and BROWNING, Circuit Judges; and FOLEY, JR., District Judge.

Appellant—Cross-Appellee will be referred to as the Commission and Appellees—Cross-Appellants jointly as Appellees and separately as MCA and Schreiber.

On February 26, 1959, by authority of 47 U.S.C. 403, the Commission published in the Federal Register (FR 1605) its order that an investigatory proceeding be instituted

> "... to determine the policies and practices pursued by the networks and others in the acquisition, ownership, production, distribution, selection, sale and licensing of programs for television exhibition, and the reasons and necessity in the public interest for said policies and practices ..."[1]

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[1] On November 10, 1959, the Commission entered a supplemental order as follows:

> "'Now Therefore, It is Ordered that the inquiry and investigatory proceeding instituted, pursuant to the Commission's Order of February 26, 1959, ... be and is hereby amended and enlarged to determine the policies, practices, mechanics and surveillance pursued and carried out by networks, station licensees and others in connection with the acquisition, ownership, production, dis-

[fol. 306] In the order, the hearing examiner designated to conduct the investigatory proceedings was authorized to receive evidence and make a record thereof, to administer oaths, subpoena witnesses, to compel their attendance, and compel the production of documentary evidence.

The order closed with this paragraph:

> "It is Further Ordered, That the said investigatory proceeding shall be a public proceeding except that the said presiding officer may order non-public sessions of the said investigatory proceeding where and to the extent that the public interest, the proper dispatch of the business of said proceeding, or the ends of justice will be served thereby."

The record reflects that while public sessions were being held in Los Angeles, California, the examiner issued a subpoena duces tecum to Schreiber, MCA's Vice President, commanding him to appear to testify and to produce documentary evidence described in the margin as Annex A and B.[2]

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tribution, selection, sale and licensing of programs for radio and television exhibition and the policies and practices pursued by networks, station licensees and others in connection with the selection, presentation and supervision of advertising material for broadcast to the public and the reasons and necessity in the public interest for said policies and practices . . ."

24 F.R. 9275.

[2] Annex

(A) A list by name or title of all television programs whether series programs, special programs, or otherwise, which appeared or were exhibited by or through the facilities of the television networks operated by NBC, CBS, or ABC since September 1, 1958, which programs were produced by MCA, Inc. or Revue Productions, Inc., and/or in which MCA, Inc. or Revue Productions, Inc. has or had a financial or proprietary interest or with regard to which MCA, Inc. or Revue Productions, Inc. is or was entitled to receive or has received a percentage of the profits or other

[fol. 307] At the time and place appointed, Schreiber appeared with counsel and produced the list in Annex A, but refused to submit the material subpoenaed in Annex B, although then and there in his possession, unless the Commission would accept said material on a confidential basis, contending that if the material was revealed at a public hearing, trade secrets would be disclosed. Schreiber further refused to testify while the hearing was public and unless his counsel be given the right to object and to state grounds of objection on the record. The examiner refused to close the hearing and to accept the subpoenaed material as confidential and directed that Schreiber's counsel not participate in the proceedings other than by being present and advising Schreiber.

Appellees petitioned the full Commission for review. The examiner was affirmed on all points and Schreiber was

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compensation or fees in connection with the production or exhibition of such programs other than remuneration or compensation for the representation as agent of individual natural persons as talent.

(B) A list of all television programs whether series programs, special programs, or otherwise, which appeared on or were exhibited by or through the facilities of the television networks of NBC, CBS, or ABC, since September 1 1958, in which MCA, Inc. or any predecessor affiliate or subsidiary of MCA, Inc. acted as packager(a) and/or, by agreement or otherwise, is entitled to receive or has received a percentage of the cost or selling price of said program or was or is entitled to receive or has received other compensation, remuneration or fees in connection with the packaging, licensing for broadcast or selling of said program, otherwise than as remuneration or compensation for the representation as agent of individual natural persons as talent.

(a) "The term 'packaging' is generally applied to the process of developing and assembling the talent and scripts for a particular program or programs. A producer has general charge of the physical processes by which the package is readied for television production." (This case below, FCC v. Schreiber, 201 F.Supp. 424.)

ordered by the Commission to produce Annex B and to testify publicly regarding the same.[3]

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[3] In its Order of January 27, 1961, affirming the Examiner, the Commission stated in part:

"It was the intention of the Commission in issuing both of the above Orders to institute a broad and comprehensive inquiry to establish a public record of the relevant policies, practices, facts and circumstances involved in the production, creation, selection, sale, licensing and exhibition of programs broadcast through the facilities of its licensees. Although the Commission empowered the Presiding Officer to accept evidence, information and data on a non-public basis, it was the Commission's express intent that the proceedings be public and that the record be available to the public, station licensees, the broadcast industry, to the Commission and to Congress. We think it clear that all of such groups have a proper interest in the complex and generally unknown processes involved in the production, sale, distribution, et cetera, of broadcast programming and, more particularly, in the factual basis for any action—legislative, rule-making or licensing—which the Commission may take as a result of its inquiry into these matters. Moreover, the policies and practices into which inquiry is and has been made herein, involve many-sided transactions between diverse and partially competitive (but also partially complementary) components and members of the same industry, such as networks, advertising agencies, program producers, program packagers, talent agencies, etc. If we are to obtain a full and rounded picture of such transactions, it is highly desirable that the facts, information, data and opinion supplied by one group or individual be known to other groups and individuals involved, so that they may verify, refute, explain, amplify or supplement the record from their own diverse points of view. In our view, a public investigatory hearing is the most effective means to this end. For these reasons, among others, we determined that public proceedings should be the rule herein, and that non-public proceedings should be used only in those extraordinary instances where dis-

[fol. 308] When Schreiber maintained the same position, the Commission sought enforcement in the court below pursuant to 47 U.S.C. §§401(a), 401(b), 409(f), and 409(g).

The learned trial Judge filed an opinion January 22, 1962, *FCC* v. *Schreiber*, 301 F.Supp. 421, and on March 2, 1962, filed his Findings of Fact, Conclusions of Law and Order.

The Conclusions of Law and Order are printed in the margin.[4]

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closure would irreparably damage private, competitive interests and where such interests could be found by the Presiding Officer to outweigh the paramount interest of the public and the Commission in full public disclosure. It was not the Commission's intention that the non-public procedure be used, solely for their own convenience, by private persons who might be called as witnesses. Nor was it the Commission's intention to accept any information on a basis which would prevent its disclosure if the public interest so requires."

[4] Conclusions of Law

I

This Court has jurisdiction of the Cause.

Communications Act of 1934, as amended, Sections 401(a), 401(b), 409(g); 47 U.S.C. §§401(a), 401(b), 409(g).

II

The Commission is authorized to conduct the instant investigation.

Communications Act of 1934, as amended, §403, 47 U.S.C. §403; *Federal Communications Commission v. Cohn*, 154 F.Supp. 899, 906 (S.D.N.Y. 1957)

III

The Commission has authority to issue the subpoena and orders sought to be enforced in this proceeding.

Communications Act of 1934, as amended, §§409(e), (f), 47 U.S.C. §§409(e), (f);

[fol. 309] Appeal By Commission

We will first deal with the appeal by the Commission and will state the questions and errors specified in the language of the Commission set forth in its opening brief.

Stahlman v. Federal Communications Commission, 126 F.2d 124, 128 (D.C.Cir. 1941);

Federal Communications Commission v. Cohn, 154 F.Supp. 899, 906 (S.D.N.Y. 1957);

See:

Hunt Foods & Industries, Inc. v. Federal Trade Commission, 286 F.2d 803, 808-809 (9th Cir., 1960) aff'g the opinion in

Federal Trade Commission v. Hunt Foods & Industries, Inc., 178 F.Supp. 448 (S.D. Cal. 1959);

Federal Trade Commission v. National Biscuit Company, 18 F.Supp. 667, 671 (S.D.N.Y. 1937).

IV

Complementing its investigative power, the Commission is authorized by Sections 4(i), 303(f) and 303(g) of the Communications Act, (47 U.S.C. §§154(i), 303(f), and 303(g)) to perform any and all acts, make such rules and regulations, issue orders not inconsistent with the Communications Act, as may be necessary in the execution of its functions and generally to encourage the larger and more effective use of radio in the public interest. Section 303(i) of the Communications Act (47 U.S.C. §303(i)) authorizes the Commission to make special regulations applicable to radio stations engaged in chain broadcasting as the public interest, convenience, or necessity require.

V

The Commission is required to report to Congress information and data considered of value in the determination of questions connected with the regulation of broadcasting and to make specific recommendations to Congress as to additional legislation which the Commission deems necessary or desirable (Communications Act, Section 4(k), 47 U.S.C. §154(k)).

[fol. 310] *Questions Presented*

1. Whether the District Court erred in finding and concluding that any further interrogation of appellees and any documents produced by them shall be taken in a private, non-

VI

The Commission was authorized by Sections 5(d)(1) and 5(d)(2) of the Communications Act (47 U.S.C. §155(d)(1)) to designate its Chief Hearing Examiner, Mr. James D. Cunningham, to preside over the taking of evidence in that phase of the investigatory proceeding pertinent to this cause.

VII

Under §6(a) of the Administrative Procedure Act, respondents were not entitled to cross-examine witnesses testifying in these hearings. Respondents were and are, however, entitled to the following:

(a) The right to have counsel accompany respondents when testifying;

(b) The right to have respondents' counsel object to any questioning by the Commission, its counsel or Hearing Examiner deemed improper by respondents' counsel;

(c) The right to have counsel for respondents present on the record concise grounds and reasons for any such objection;

(d) The rights to have counsel for respondents, without interference by the Commission, its counsel or Hearing Examiner, initiate advice to his client with respect to the propriety or legality of any question asked of his client and to advise his client not to answer any such questions deemed improper.

VIII

The information requested in "Annex B" of the Commission's subpoena is reasonably relevant to the inquiry being conducted by the Commission.

Mines & Metals Corp. v. Securities and Exchange Commission, 200 F.2d 317, 321 (9th Cir. 1952);
Detweiler Bros. v. Walling, 157 F.2d 841 (9th Cir. 1946);

[fol. 311] public proceeding and held by the Commission on a confidential basis; that the Commission must move the Dis-
[fol. 312] trict Court for an order allowing the documents

United States v. Woerth, 130 F.Supp. 930, 937-939 (N.D. Iowa 1956).

IX

The Federal Communications Commission possesses a broad power of investigation and subpoena, and the fact that the respondents were not licensees of the Commission did not prevent it from seeking the required information from them.

Federal Communications Commission v. Cohn, 154 F.Supp. 899, 906 (S.D.N.Y. 1957);
Stahlman v. Federal Communications Commission, 126 F.2d 124, 128 (D.C. Cir. 1941).

X

The alleged failure of the Commission to promulgate adequate ground rules to cover the proceeding did not prejudice respondents.

Administrative Procedure Act, Section 10(e) [5 U.S.C. §1009(e)].

XI

The subpoena and order duly served upon respondents in this proceeding are in all respects valid, and respondents are in disobedience of the same.

XII

This Court has the power to retain jurisdiction for any subsequent proceedings consequent upon the Order issued.

Hunt Food & Industries, Inc. v. Federal Trade Commission, 286 F.2d 803, 813 (9th Cir. 1960).

In accordance with the Findings of Fact and Conclusions of Law:

1. It is Hereby Ordered that respondents, MCA, Inc. and Taft B. Schreiber, are hereby ordered to appear before a Presiding Officer duly appointed by the Federal Communications Commission at a time and place to be fixed by the,

and testimony to be made public; and that appellees shall have the right to oppose such a motion.

2. Whether the District Court erred in concluding that

Commission, to testify and to produce books, papers and documents in accordance with the subpoena issued and served upon the respondents on October 17, 1960, and orders issued by the Commission and duly served upon the respondents.

2. It is Further Ordered that any further interrogation of respondents and any documents produced by respondents be taken and held by the Commission in private and confidential session, that the public be excluded therefrom, that all testimony adduced and documents produced be maintained in confidence by the Commission, that the Commission by motion duly made and served, may move the Court upon the conclusion of such interrogation and production for an order, should good cause exist therefor, permitting such testimony and documents to be made public, and that respondents shall retain the right to oppose such motion if and when so made.

3. It is Further Ordered that in the course of any further interrogation of respondents:

a) Counsel for respondents shall not be entitled to cross-examine witnesses;

b) Respondents shall have the right to have counsel accompany respondents when testifying, the right to have respondents' counsel object to any questioning by the Commission, its counsel or the Hearing Examiner deemed improper by respondents' counsel, the right to have counsel for respondents present on the record concise grounds and reasons for any such objection, and the right to have counsel for respondents, without interference by the Commission, its counsel or the Hearing Examiner, initiate advice to his client with respect to the propriety or legality of any question asked of his client and to advise his client not to answer any such question deemed improper.

c) If respondents decline to answer any questions upon advice of counsel or otherwise, the propriety of all such questions shall be ruled upon by this Court

under Section 6(a) of the Administrative Procedure Act, 5 U.S.C. 1005(a), appellees have the following rights:

(a) The right to have their counsel object to any questioning by the Commission, its counsel, or the presiding officer deemed improper by appellees' counsel.

(b) The right to have appellees' counsel present, on the record, concise grounds and reasons for any such objection.

Specification of Errors

1. The District Court erred in its Finding of Fact XI.

2. The District Court erred in its Conclusion of Law VII(b) and VII(c).

We will consider these questions and specifications of error in the order set forth above.

First Question and Specification of Error

In his decision (pp. 425-426 of 201 F.Supp.), the Trial Judge stated:

"However, I am of the opinion that in view of the well-grounded fears of the respondents that the testimony to be given might result in disclosure of trade-secrets, of which competitors might take advantage, it [fol. 313] is ordered that the Examiner confine attend-

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upon appropriate motion by any of the parties hereto, and respondents shall not be deemed to be in contempt either of this Court or of the Commission or suffer or incur any penalty until and unless the Court has ruled in favor of the propriety of any such questions and respondents thereafter refuse or decline to answer the same.

4. It is Hereby Ordered that the Order of this Court shall be, and it is hereby, stayed during and throughout the period within which an appeal may be taken from such Order, and, if an appeal be taken therefrom, such stay shall remain in effect during and throughout the period of the pendency of the appeal.

5. The Court retains jurisdiction of this cause for any subsequent proceedings consequent upon this order.

ance at the hearing to the persons directly involved in the proceedings, their counsel, experts and witnesses, and exclude the general public."

"The respondents, MCA, Inc., and Taft B. Schreiber, are hereby ordered to appear before a Hearing Examiner duly appointed by the Commission at a time and place to be fixed by the Commission, to testify and to produce books, papers and documents in accordance with the above mentioned subpoena and orders issued by the Commission and duly served upon the respondents, Jurisdiction will be retained by the Court for any subsequent proceedings consequent upon the order. (Hunt Food & Industries, Inc. v. Federal Trade Commission, 9th Cir., 1960; 286 F.2d 803, 813)."

The Trial Court's Finding of Fact No. XI reads:

"The record herein, including but not limited to, the testimony in the extensive hearings held by the Commission in its network programming inquiry, make it necessary that in protection of respondents' rights and to preclude disclosure of trade secrets of which competitors might take advantage, all further interrogation of, and all further testimony given by, respondents shall be given in non-public sessions, and shall be retained and maintained in confidence by the Commission."

The Commission does not question that the Trial Court had the authority to impose safeguards to prevent the possible disclosure of trade secrets, while ordering that appellees appear, testify and disclose the material sought by the Commission, but contends that the District Court abused its discretion and therefore erred.

In *Chapman* v. *Maren Elwood College*, 9th Cir., 1955, 225 F.2d 230, at Page 231, we stated:

"The key question in enforcement of the demand to produce records is whether it is reasonable or arbitrary ... The question of reasonableness is one for consideration and adjudication by the courts. The mere fact that a demand has been made by an administrative agency does not establish the demand as reasonable."

[fol. 314] In *Goldberg* v. *Truck Drivers Local Union No. 299*, 6th Cir., 1961, 293 F.2d 807, at Page 814, the Court states:

> "In our opinion, it was not unreasonable to compel production of records which the law required to be kept and from which the reports filed with the Secretary were made . . . The District Court, however, had the power to impose protective restraints on the conduct of the investigation to relieve against oppression or other illegal conduct. Hunt Foods & Industries, Inc. v. Federal Trade Commission, 9th Cir., 286 F.2d 803, 811, certiorari denied 365 U.S. 877, 81 S.Ct. 1027, 6 L.Ed. 2d 190."

In *FCC* v. *Cohn*, S.D.N.Y., 1957, 154 F.Supp. 899, at Page 908, the Court held:

> "Of course the subpoena power must at all times be confined to 'the rudimentary principles of justice', and the courts will plainly refuse to enforce an administrative subpoena which is not within the bounds of reasonableness. Hale v. Henkel, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652; Chapman v. Maren Elwood College, 9th Cir., 225 F.2d 230; NLRB v. Anchor Rome Mills, 5th Cir., 197 F.2d 447, 449-450. There is a delicate balance between the necessity of obtaining information required in the public interest in furtherance of a lawful inquiry, and the onerous burdens which the furnishing of this information may place on these respondents. But in the case at bar the scales are tipped on the side of the public interest so as to outweigh the burden and inconvenience to the respondents."

and at Page 911,

> "Subpoenas of an administrative agency, though validly issued, need not be enforced precisely according to their terms or without modification. Whenever it is made to appear that a subpoena is so broadly drawn as to be oppressive and unreasonable it is the duty of the court to prevent abuse of its process and to place such limitations upon the subpoena as is just and right under all the circumstances. NLRB v. Anchor Rome Mills,

5th Cir., supra, 197 F.2d, at Page 449; see Kilgore National Bank v. Federal Petroleum Board, 5th Cir., 209 F.2d 557, 560; cf. Chapman v. Maren Elwood College, [fol. 315] 9th Cir., 225 F.2d 230, supra; Walling v. American Rolbal Corp., 2nd Cir., 135 F.2d at Page 1005, supra. These matters are in the court's discretion."

In *Delno* v. *Market St. Ry. Co.*, 9th Cir., 1942, 124 F.2d 965, at Page 967, this Court said:

"Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court then it cannot be said that the trial court abused its discretion."

In a recent case, *Weller* v. *Dickson*, 9th Cir., 1963, 314 F.2d 598, beginning on Page 600, we said, in part:

"... we must consider for a moment what is meant by the exercise and abuse of discretion. The judicial efforts to give these expressions some legal stability are legion. It was held in Hartford-Empire Co. v. Obear-Nester Co., 95 F.2d 414, 417 (8th Cir., 1938) that where an appellate court has power to review the exercise of a judicial discretion governed by situation and circumstances affecting exercise of discretion, inquiry is confined to the question whether the situation and circumstances clearly show an 'abuse of discretion', that is, arbitrary action not justified in view of the situation and circumstances.

"The court in NLRB v. Gurnsey-Muskingum Elect. Co-op., 285 F.2d 8, 11 (6th Cir., 1960) pointed out that there is no exact measure of what constitutes an abuse of discretion, and it is more than the substitution of judgment of one tribunal for that of another, discretion being governed by situation and circumstances affecting each individual case, and even where an appellate court has power to review exercise of such discretion, inquiry is confined to whether such situation and circumstances clearly show an abuse of discretion,

that is, arbitrary action not justifiable in view of such situation and circumstances.

[fol. 316] "Present day decisions have tended to erode the common law meaning of many words and phrases used in legal literature and as a result the word 'discretion' as it is now generally used in the law, is but an anemic facsimile of a robust ancestor. Unless we are about to attend its demise, and make the word entirely meaningless, we should proceed with some caution."

In *Wigmore on Evidence,* McNaughton Revision, Volume VIII, Section 2212, under the title "Trade Secrets and Customers' Names", we note the following language:

"Accordingly, there ought to be and there is, in some degree, a recognition of the privilege not to disclose that class of facts which, for lack of a better term, have come to be known as trade secrets.

"Nevertheless, the occasional necessity of recognizing it should not blind us to the danger of such a measure, or entice us into an unqualified sanction for such a demand . . . In other words, a person claiming that he needs to keep these things secret at all should be expected to make the exigency particularly plain . . . No privilege at all should there be conceded, although as much privacy as possible might be preserved by compelling disclosure no farther than to the judge himself, . . ."

We hold, therefore, that the Trial Judge did not abuse his discretion, but, on the contrary, established a fair and just procedure whereby a most important investigation could proceed without being unduly disrupted, obstructed or prolonged, and at the same time afford appellees protection against the improvident disclosure of possible valuable trade secrets.

Second Question and Specification of Error

Did the District Court err in its Conclusion of Law No. VII (b) and (c), which reads,

"Under §6(a) of the Administrative Procedure Act, respondents were not entitled to cross-examine wit-

nesses testifying in these hearings. Respondents were and are, however, entitled to the following:

[fol. 317] "(b) The right to have respondents' counsel object to any questioning by the Commission, its counsel or Hearing Examiner deemed improper by respondents' counsel.

"(c) The right to have counsel for respondents present on the record concise grounds and reasons for any such objections."

The parties agree and we so hold that the proceedings in this case are investigatory and not adjudicative in nature. They also agree that the right of counsel to object and argue objections on the record, if it exists in this case, is not a constitutional right, but a statutory right. We concur: see *Hannah v. Larche*, 363 U.S. 410, 4 L.Ed. 2d 1307, 80 S.Ct. 1502 (1960).

Does the first sentence of Section 6(a) of the Administrative Procedure Act (5 U.S.C. §1005(a)) apply to fact-finding investigations by the Commission, or is the sentence applicable only to the Commission's adjudicative functions?

Professor Davis in his work, Administrative Law Treatise, Volume I, Section 8.10, Right to Counsel, writes:

"The Administrative Procedure Act provides in §6(a): 'Except as otherwise provided in this Act— . . . Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding.'

"The first sentence reverses the law declared in Bowles v. Baer, 142 F.2d 787, (7th Cir. 1944), holding that witnesses subpoenaed in an administrative investigation may be denied representation by counsel. If the person is 'compelled to appear in person', he is entitled to counsel."

The first sentence of Section 6(a) has been held to assure the appearance of counsel with taxpayers and with other witnesses compelled to appear for examination before

agents of the Internal Revenue Service conducting private [fol. 318] investigations. *Backer v. Commissioner of Internal Revenue,* 5th Cir., 1960, 275 F.2d 141; *In Re Neil,* D.C.S.D. W.Va., 1962, 209 F.Supp. 76; *United States v. Smith et al.,* D.C. Conn., 1949, 87 F.Supp. 293. The statutory authority for the appearance of counsel in these cases is the Administrative Procedure Act. In the Internal Revenue Code, Congress did not provide for the appearance of counsel in such cases.

The Trial Judge, in his opinion in this case, at Page 423 of 201 F.Supp., pointed out that in *Hannah,* the Supreme Court considered the meaning of the right to counsel before regulatory agencies conducting fact-finding investigations. While this is true, in our reading of *Hannah,* the Civil Rights Act and not the Administrative Procedure Act is the source of authority for appearance of counsel.

The Supreme Court did not hold that the first sentence of Section 6(a) applies to investigations by regulatory agencies. As a matter of fact, the Commission argues that in *Hannah,* the Court, by implication, took the contrary position. Beginning at Page 445 of 363 U.S., we find this language:

> "Although these agencies normally make determinations of a quasi-judicial nature, they also freqeuntly conduct purely fact-finding investigations. When doing the former, they are governed by the Administrative Procedure Act, 60 Stat. 237, 5 USC §§1001-1011, and the parties to the adjudication are accorded the traditional safeguards of a trial. However, when these agencies are conducting nonadjudicative, fact-finding investigations, rights such as apprisal, confrontation, and cross-examination generally do not obtain."

What the Supreme Court actually decided in *Hannah* was that the Due Process Clause of the Fifth Amendment did not require that, in fact-finding, nonadjudicative investigations, "the full panopoly of judicial procedures be used . . . due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings . . ." (p. 442 of 363 U.S.). Thus, in stating that when an agency acts quasi-judicially, it is gov-

erned by the Administrative Procedure Act and the parties are accorded the "traditional safeguards of a trial", the Court is indicating that the Administrative Procedure Act [fol. 319] assures due process under the Fifth Amendment where there is a trial-type, adjudicative proceeding.

Unlike the Civil Rights Act considered in *Hannah*, the Federal Communications Act does not provide for the appearance of counsel when the Commission conducts a fact-finding, nonadjudicative investigation. Therefore, unless the first sentence of Section 6(a) applies, counsel's right to appear and participate in the instant hearing exists only by virtue of the Commission's duly promulgated Rules and Regulations.

Since the Supreme Court has not decided the question of the applicability of the first sentence of Section 6(a) of the Administrative Procedure Act to nonadjudicative, fact-finding investigations, neither should we, unless it is necessary. We need not and do not do so, because, assuming that the first sentence of Section 6(a) applies to the instant investigation, we hold that its requirements have been met.[5]

Appellees contend that the word "represented" in the phrase "the right to be accompanied, represented, and advised by counsel" in the first sentence of Section 6(a) entitled counsel to object and to state grounds in support of objections on the record and the Trial Judge apparently agreed.

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[5] From the record, it is clear that Schreiber was permitted by the Commission to be accompanied and advised by counsel. While the record does show that the Examiner did on one occasion deny counsel the right to initiate advice to the subpoenaed witness, the Commission has not appealed from subparagraph (d) of paragraph VII of the Trial Court's Conclusion of Law (Note 4 supra) that under Section 6(a), appellees were entitled to:

> "(d) The right to have counsel for respondents, without interference by the Commission, its counsel or Hearing Examiner, initiate advice to his client with respect to the propriety or legality of any question asked of his client and to advise his client not to answer any such questions deemed improper."

This is a question of first impression. We hold that the word "represented" must be read in light of the Due Process Clause of the Fifth Amendment and therefore varies in meaning depending upon the nature of the function being exercised. While counsel may, as a matter of right, object and argue objections on the record, just as he may, as a matter of right, cross-examine and call witnesses in a trial-type, adjudicatory proceeding, these rights do not exist in [fol. 320] the fact-finding, nonadjudicative investigation unless specifically provided by statute or duly promulgated rules. The right to object and argue objections on the record is not to be implied, here, from the use of the word "represented" in Section 6(a).

The Commission's proposed Conclusion of Law No. VII reads as follows:

"VII

"The respondents were accorded the representation by counsel to which they were entitled by law in an investigatory proceeding such as that before the Commission.

"*Hannah v. Larche,* 363 US 420, 446 (1960)
"*Administrative Procedure Act,* §6(a) (5 USC §1005(a))".

The Trial Court rejected the Commission's proposed Paragraph VII in favor of Paragraph VII proposed by appellees. For the reasons given, the Trial Court erred in so doing. Under the Federal Communications Act, the Commission has the authority to limit counsel in this regard. Inherent in the Commission's power of investigation (47 U.S.C. §403) is the authority "to prevent the sterilization of investigations by burdening them with trial-like procedure." (*Hannah* v. *Larche,* Page 448 of 363 U.S.).

The reasoning in *Hannah* supports our position. There, the Court quotes with approval a rule of the Federal Trade Commission that while "persons summoned to appear before investigative proceedings . . . may have the advice of counsel, 'counsel may not, as a matter of right, otherwise participate in the investigation.' " (p. 446 of 363 U.S.).

Cross Appeal by Appellees

Appellees contend that the District Court erred by failing to conclude that the Commission is without power to compel appellees to produce documents requested and to give testimony until the Commission complies with the requirements of Section 3 of the Administrative Procedure Act by promulgating and publishing proper rules governing the procedures for investigative proceedings.

[fol. 321] The language of Section 3(a) of the Administrative Procedure Act relied upon by appellees is found in 5 U.S.C. §1002, and in its pertinent parts, reads,

> "(a) Every agency shall separately state and currently publish in the Federal Register . . . substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published."

Appellees contend, generally, that the Commission is required to promulgate and publish rules and regulations governing investigations similar to the Commission's rules of practice applicable to its adjudicative proceedings (47 C.F.R. §§1.11-1.56) and specifically that there must be promulgated and published procedures governing the role of counsel, witnesses and review by the Commission of determinations made by the Examiner.

The Commission cites Section 1.10 of its Rules and Regulations (47 C.F.R. §1.10), as follows:

> "*Proceedings before the Commission.* The Commission may on its own motion or petition of any interested party hold such proceedings as it may deem necessary from time to time in connection with the investigation of any matter which it has power to investigate under the law, or for the purpose of obtaining information necessary or helpful in the determination of its policies, the carrying out of its duties or the formulation or amendment of its rules and regulations. For such pur-

poses it may subpena witnesses and require the production of evidence. Procedures to be followed by the Commission shall, unless specifically prescribed in this part, be such as in the opinion of the Commission will best serve the purpose of such proceeding."

The Commission calls to our attention that it has published in the Federal Register some thirteen orders governing this proceeding.[6]

[fol. 322] We find that the record supports the Commission's position that appellees have had full and complete notice of all proceedings taken which concern them and that appellees have not been prejudiced in any manner by the Commission's failure to promulgate and publish rules and regulations if required. Appellees apparently concede that this is so, but argue that they may be prejudiced in the future since the Commission's investigation has not been completed.

The Trial Judge found these objections without merit. At Page 425 of 201 F.Supp., he said:

"The complaint that the Commission has not promulgated 'ground rules' as required by the Administrative Procedure Act (5 U.S.C.A. §§1002, 1003) is not well taken. It is doubtful if the provisions of that Act apply to any but adjudicating agencies. (Hannah v. Larche, supra, 363 U.S. pp. 452-453, 80 S.Ct. 1502, 4 L.Ed. 2d 1307). Furthermore, there is evidence in the record showing that rules have been promulgated which are suited to the needs of the Commission. At any rate, unless and until an adjudicative stage is reached, the failure to make rules becomes an abstract question which need not be decided now. Failure to do so does not prejudice the respondents."

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[6] References to the Federal Register are footnoted. Note 4, Page 425, of 201 F.Supp., as follows:

"See, §1.10 of the Commission's Rules and Regulations, 47 C.F.R., §1.10 and thirteen special orders issued in the present proceeding, and published. See, 24 F.R. 1605, 2918, 3060, 5122, 5726, 9275, 9377; 25 F.R. 2116, 6998, 7552; 26 F.R. 992, 1194, 4462."

We also note Paragraph X of the Conclusions of Law reads:

"X

"The alleged failure of the Commission to promulgate adequate ground rules to cover the proceeding did not prejudice respondents.

"Administrative Procedure Act, Section 10(e), [5 U.S.C. §1009(e)]."

It is not necessary for us to decide whether Section 3(a) applies to nonadjudicative, fact-finding investigations, and it is unnecessary to define the term "substantive rule" as [fol. 323] used in Section 3(a) or to determine if the rules appellees seek constitute rules of substance or procedure,[7] since failure to promulgate and publish rules has not prejudiced appellees.

While Section 10(e) of the Administrative Procedure Act directs the reviewing court to set aside agency action found to be taken without observance of procedure required by law, it also directs that the Court take due account of the rule of prejudicial error. See *Madokoro* v. *Del Guercio*, 9th Cir., 1947, 160 F.2d 164, 167, cert. denied 332 U.S. 764; *Alesi* v. *Cornell*, 9th Cir., 1957, 250 F.2d 877, 879; *Florida Citrus Commission* v. *United States*, D.S.N.D. Fla., 1956, 144 F.Supp. 517, 521; aff'd. 362 U.S. 1021.

We refuse to speculate about the future. In the event

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[7] *Ranger* v. *FCC*, 1961, 294 F.2d 240, 244, reads, in part:

"But the Administrative Procedure Act excepts from formal rule making requirements amendments which effect only procedural changes. The Commission insists that the amendment here involved was a procedural change, and we agree. Of course all procedural requirements may and do occasionally affect substantive rights, but this possibility does not make a procedural regulation a substantive one."

See *Hotch* v. *U.S.*, 9th Cir., 1954, 212 F.2d 250, where this Court struck down a criminal conviction for failure to properly promulgate and publish a substantive rule required by Section 3(a) of the Administrative Procedure Act.

other conflicts arise during the investigation, judicial review is available. We find the cross appeal without merit.

We affirm the Trial Court, except that Subparagraphs (b) and (c) of Paragraph VII of the Conclusions of Law are stricken and the order below is modified to conform to this opinion.

BROWNING, C. J., dissenting in part:

I

Under federal regulation primary responsibility for program content is imposed upon individual television broad- [fol. 324] cast licensees.[1] The purpose of the present investigation is to determine whether control of program content has in fact passed into the hands of others, and, if so, what administrative action should be taken, or legislative action recommended, in response to the shift in power.[2] The authority of the Commission to conduct such an inquiry is not questioned.[3] The public interest in its thoroughness and effectiveness is obviously great.

Mr. Schreiber is Vice President of MCA, Inc. The Com-

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[1] As the Commission stated in its order of Nov. 10, 1959, 24 Fed. Reg. 9275:

> . . . under the Communications Act and the policies promulgated by the Commission thereunder, the selection, supervision and broadcast to the public of programs and other material including advertising is the primary responsibility of the licensed broadcaster subject to the duty of such broadcaster so to exercise that responsibility as to serve the public interest in terms of the needs and interests of the community which such broadcaster is licensed to serve . . . .

[2] The purpose and scope of the inquiry are detailed in the Commission's orders of Feb. 26, 1959, 24 Fed.Reg. 1605, and Nov. 10, 1959, 24 Fed.Reg. 9275.

[3] Congress granted the Commission "full authority and power at any time to institute an inquiry . . . as to any matter . . . concerning which any question may arise under any of the provisions" of the Communications Act of 1934. 47 U.S.C.A. §403.

mission has found, without challenge, that MCA "engages on a large scale, in all facets of television program production," and that 'failure fully to explore the policies, practices and activities of MCA, Inc. . . . would seriously impair, if not render nugatory," the Commission's inquiry.

Schreiber and MCA do not question the validity of the Commission's subpoenas and orders requiring the testimony of Schreiber and the production of the records of MCA described in Annex B.[4] They contend only that the Commission erred in declining to receive the testimony and documents in confidence.

The order initiating the inquiry directed that the proceedings be public, except where the public interest, the proper [fol. 325] dispatch of business, and the ends of justice would be served by nonpublic sessions. The exception, as the Commission later made clear, was intended to permit the presiding officer to order nondisclosure of particular evidence "where disclosure would irreparably damage private, competitive interests and where such interests could be found . . . : to outweigh the paramount interest of the public and the Commission in full public disclosure."[5]

The adoption of this rule of procedure was well within the Commission's power. Section 4(j) of the Communications Act of 1934 (47 U.S.C.A. §154(j)) provides that the Commission "may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." Congress by this grant of authority to the Commission "left largely to its judgment the determination of the manner of conducting its business . . . ."

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[4] The District Court held that "the Commission has authority to issue the subpoena and orders sought to be enforced in this proceeding"; that "the information requested in 'Annex B' of the Commission's subpoena is reasonably relevant to the inquiry being conducted by the Commission"; and that "the subpoena and order duly served upon respondents in this proceeding are in all respects valid, and respondents are in disobedience of the same." Schreiber and MCA have not challenged these findings and conclusions on their cross-appeal.

[5] See note 3 of this court's opinion.

FCC v. *WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 282 (1949).[6]

Grants of agency authority comparable in scope have been held sufficient to authorize public production of information,[7] [fol. 326] or receipt of data in confidence,[8] in investigative

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[6] The Commission's own statement of its authority in this regard is similarly broad. Section 1.10 of the Commission's General Rules of Practice and Procedure provides that procedures to be followed in investigative proceedings shall "be such as in the opinion of the Commission will best serve the purposes of such proceeding." 47 C.F.R. §1.10 (1958).

[7] See, e.g., Isbrandtsen-Moller Co. v. United States, 300 U.S. 139 (1937); E. Griffith Hughes Inc. v. FTC, 63 F.2d 362 (D.C. Cir. 1933).

It is "the fundamental policy of free societies that justice is usually promoted by disclosure rather than secrecy." Boeing Airplane Co. v. Coggeshall, 280 F.2d 654, 662 (D.C. Cir. 1960). "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Brandeis, Other People's Money (1914), quoted in In re Util. Employees Sec. Co., 3 S.E.C. 1087, 1094 (1938). See also In re H. P. Hood & Sons, Inc., No. 7709, FTC, March 14, 1961, 11 Pike & Fischer, Admin. Law (2d) 116 (1962); Trade Reg. Rep. ¶29461 (FTC 1961), Comment 60 Mich. L.Rev. 647 (1961-1962).

Public exposure may also, however, be an instrument of abuse. See generally Rourke, Law Enforcement through Publicity, 24 U.Chi.L.Rev. 225 (1956-1957); Newman, Due Process, Investigations and Civil Rights, 8 U.C.L.A. L. Rev. 735, 755-58 (1961); Gellhorn & Byse, Administrative Law 666-75 (4th ed 1960); Note, 72 Yale L.J. 1227 (1963).

[8] See Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 321-22 (1933); Bowles v. Baer, 142 F.2d 787, 789 (7th Cir. 1944); Woolley v. United States, 97 F.2d 258, 262 (9th Cir. 1938). "Agencies themselves, of course, may make investigative proceedings private, excluding the public." Davis, Administrative Law 229 (1958). Section 6(b) of the Administrative Procedure Act (APA) contemplates "a nonpublic investigatory proceeding." 5 U.S.C.A. §1005(b).

inquiries, as the agency may determine to be proper on a balancing of public interest and private rights in the particular instance. The choice cannot be arbitrary or an abuse of the agency's discretion, and judicial relief is available if it is.[9] But the decision in the first instance belongs to the administrative authority, and its decision is not to be disturbed unless these limits are transgressed.[10]

See Newman, Federal Agency Investigations: Procedural Rights of the Subpoenaed Witness, 69 Mich.L.Rev. 169, 172 (1961-1962).

[9] See, e.g., Bank of America Nat'l Trust & Sav. Ass'n v. Douglas, 105 F.2d 100, 102 (D.C.Cir. 1939); FCC v Cohn, 154 F.Supp. 899, 912-13 (S.D.N.Y. 1957); FTC v. Bowman, 149 F.Supp. 624, 630 (N.D. Ill. 1957), aff'd 248 F.2d 456 (7th Cir. 1957); 1 Davis, Administrative Law 229 (1958). See also Menzies v. FTC, 242 F.2d 81, 84 (4th Cir. 1957).

[10] The following comments regarding agency discretion to choose between public and private disclosure were made in the light of statutory provisions which granted the agencies concerned no greater power over the conduct of hearings than is vested in the Commission by 47 U.S.C.A. §154(j):

American Sumatra Tobacco Corp. v. SEC, 93 F.2d 236, 239 (D.C.Cir. 1937), 110 F.2d 117, 120-21 (D.C.Cir. 1940):

> For unquestionably Congress . . . imposed on the Commission the duty of considering the claimed danger of loss and damage and of weighing it in the scale of public interest. And this, at least, is what the Commission has attempted to do and, if the conclusion reached is just as likely to be correct as incorrect, it is our duty to let it stand.
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> . . . [T]he question is primarily not for us but for the Commission, and Congress unquestionably intended that the Commission should bring to bear upon the decision of this and like questions, what has been called in cases within the jurisdiction of the Interstate Commerce Commission, the knowledge and experience of experts. This does not by any means set up an inquisition destructive of the rights of the individual. The delegated power is not to be exercised arbitrarily or to be considered an unfettered discretion over the property of the citizen. Its exercise is subject to review. But

[fol. 327] The reasons for the Commission's decision to require public disclosure in the present inquiry appear fully

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so long as the Commission's decision rests on substantial evidence and on inferences which are not arbitrary and capricious, it should be sustained. . . .

E. Griffith Hughes Inc. v. FTC, 63 F.2d 362, 363 (D.C.Cir. 1933): "Doubtless Congress considered that there might be occasions when it would be unjust to a person or corporation proceeded against to require public hearings and left the decision in such cases to the board." And at 364: "Doubtless on such a hearing as is here provided the Commission has discretion, on a showing that such a hearing would disclose trade secrets or other data in itself destructive of the business under investigation, to do whatever is proper and necessary to avoid these consequences . . . ."

SEC v. Harrison, 80 F.Supp. 226, 229 (D.D.C. 1948): ". . . it must rest in the sound discretion of the agency created by the Congress, and not with the courts, to determine when investigations are to be conducted by open or closed hearings."

See also Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 321-22 (1933).

The same rule should apply whether the question is raised in a proceeding brought by the agency to compel testimony or production of documents, or in a suit brought by a proposed witness or custodian of documents to restrain the inquiry. The standard applied in the former [that is, whether the administrative officer has acted "arbitrarily or in excess of his statutory authority," Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 216 (1946), or whether the inquiry is authorized by law, the materials relevant, and the disclosure reasonable, Cooper, Federal Agency Investigations: Requirements for the Production of Documents, 60 Mich.L.Rev. 187 (1961-1962)] is in substance the same as that applied in the latter [that is, whether the process is "authorized by law," APA §6(b), 5 U.S.C.A. §1005(b), the evidence sought is of "general relevance and reasonable scope," APA §6(c), 5 U.S.C.A. §1005(c), or whether the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." APA §10(e), 15 U.S.C.A. §1009(e)].

in the record.[11] The inquiry is purely investigative; its sole purpose is to secure information to aid the Commission in the discharge of its functions; it "is not intended to and cannot adjudicate the rights of any person."[12] The subject matter of the inquiry is "complex and generally unknown," [fol. 328] and involves "many-sided transactions" among "networks, advertising agencies, program producers, program packagers, talent agencies" and others. Therefore, in order "to obtain a full and rounded picture of such transactions, it is highly desirable" that the information supplied by each group or individual be disclosed so that the others "may verify, refute, explain, amplify or supplement the record from their own diverse points of view.' Moreover, through public hearings the industry may be made aware of the factual basis supporting any action ultimately taken, a practical inducement to industry acceptance of the inquiry's results.[13] These factors, it may be noted, are largely of a kind falling within the special competency of the administrative agency to perceive and to evaluate.

Having determined that the public interest required public disclosure, the Commission properly placed the burden

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[11] See note 3 of this court's opinion.

[12] For a development of the argument that the need for nonpublic hearings is greater where investigatory hearings are preliminary to enforcement proceedings, rather than, as here, for the purpose of gathering information for rule-making or legislation, see Note, The Distinction between Informing and Prosecutorial Investigations: A Functional Justification for "Star Chamber" Proceedings, 72 Yale L.J. 1227 (1963).

[13] "In such investigations a primary function of the process is to reach an external audience which includes the Congress, those segments of the public which are primarily affected by the agency's regulatory policies, and the body politic itself. While the use of public hearings is not strictly necessary for the dissemination of the information produced, the publicity generated by the gathering of raw rata may contribute substantially to the effectiveness of the informing process." Note, 72 Yale L.J. 1227, 1236 (1963).

of justification upon those who asked that the evidence sought from them be received in confidence.[14]

It cannot be said with reason that the Commission acted arbitrarily or in abuse of discretion in determining that Schreiber and MCA failed to discharge their burden of justifying nondisclosure.

[fol. 329] A. *As to Annex B*

Schreiber testified that the information sought by Annex B would disclose MCA's agency relationship with clients, and that under a contract between the Screen Actors Guild and Artists & Managers Guild such relationships were not to be disclosed without the clients' consent. He further stated that the disclosure "would be possibly advantageous to our competitors." No more was shown.

Obviously, a private agreement not to disclose facts without consent could not affect the Commission in the discharge of its public duties.[15] And there was no actual showing, but only the naked assertion, that the disclosure sought by Annex B would injure either MCA or its clients.

Annex B called only for the production of a list of programs as to which MCA served as "packager" or had a financial interest,[16] and MCA's competitors had furnished

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[14] See, e.g., Graber Mfg. Co. v. Dixon, C.A. No. 2869-62, D.D.C., Nov. 6, 1963: "Of course, the public interest in open hearings places the burden upon the plaintiffs to show that their documents should be received in confidence." Section 3(c) of APA, 5 U.S.C.A. §1002(c) provides: "Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential *for good cause found.*" (Emphasis added.) Cf. authorities cited note 24 infra.

[15] 8 Wigmore, Evidence §2286 (McNaughton rev. 1961).

[16] Customer lists are not entitled to protection per se, but only when the circumstances establish that disclosure would result in competitive injury. See, e.g., Ellis, Trade Secrets §72 (1953); Barton, A Study in the Law of Trade Secrets, 13 U.Cinc.L.Rev. 507, 526-29 (1939); In re H. P. Hood & Sons, Inc., No. 7709, FTC, March 15, 1961; 11 Pike & Fischer,

the same information without objection.[17] The presiding officer had in the past protected from disclosure detailed information regarding financial matters and contractual arrangements which might in fact harm private interests without sufficient compensatory benefit to the public, and had offered to take the same action if information produced by MCA justified such treatment. He declined only, on the record made, to receive the information under a binding condition preventing disclosure, imposed in advance of production.

On this record, affirmance by the Commission of the presiding officer's action as to the material sought by Annex B was clearly proper.

[fol. 330] B. *Blanket Nondisclosure*

On remand to the presiding officer a broader contention developed. Schreiber and MCA then argued that *all* testimony and documentary evidence to be elicted from them should be received in nonpublic sessions, and disclosed only if a court, in subsequent litigation, should order its release.

There was no factual showing before the presiding officer in support of this sweeping request for nondisclosure; only an argument.

Schreiber and MCA contended that in view of the announced scope of the inquiry the Commission's order to produce "all . . . relevant" material might require MCA "to set forth in a public record every facet of its business" relating to television programing, and that such a disclosure, if demanded, would necessarily include confidential business secrets and expose them to MCA's competitors.

The presiding officer did not know what information would actually be sought; and he could not strike a balance between the public benefit which would result from public disclosure of unidentified information and the injury which

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Admin. Law (2d) 116 (1962). See also Schenley Industries v. Institutional Prods. Corp., 16 F.R.D. 13, 15 (S.D.N.Y. 1954).

[17] Schreiber also provided, without objection, a list of programs as to which MCA had acted as producer rather than as packagers, called for by Annex A.

MCA would suffer by the revelation of the unspecified data to its competitors. If and when information was requested which if disclosed might in fact injure MCA's competitive interests, there would be ample opportunity to request that it be received in confidence, and to seek judicial protection if the request were denied. Blanket nondisclosure would have been appropriate only on the assumption that no testimony could be elicited from Schreiber and no documents could be obtained from MCA which could be publicly disclosed. There was no warrant for such an assumption.

The presiding officer [18] acted well within his discretion in refusing to order blanket nondisclosure upon such a record. [fol. 331] In the District Court, as in this court, Schreiber and MCA conceded that no one knew what information Schreiber and MCA might be asked to produce. However, they asserted that an order requiring *in camera* hearings was nonetheless reasonable because the District Court could properly "assume" from questions asked of prior witnesses, and financial and corporate data from public sources which had been introduced in the record, that the Commission intended "to probe deeply into the business affairs of MCA," and therefore that the District Court could properly find, as it did, "that the testimony to be given might result in disclosure of trade-secrets, of which competitors might take advantage." 201 F.Supp. at 425.

Obviously this "showing" added nothing of substance to that made before the presiding officer. It remained wholly speculative whether the Commission would in fact seek to elicit data which if disclosed to competitors would injure MCA, and whether, if such data were sought, the presiding officer would require disclosure even though a balancing of public and private rights justified nondisclosure. At best,

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[18] On review of the presiding officer's first order, the Commission, although dealing with the merits of that order, held "that orders and directions of the Presiding Officer as to relevance and public disclosure of evidence, information and data are interlocutory in nature, do not of themselves 'aggrieve' any person, and are not, as of right, appealable to the Commission." This holding precluded an application to the Commission for review of the presiding officer's second order.

the order was premature, and possibly wholly unnecessary. Moreover, it permitted Schreiber and MCA to avoid submitting to the presiding officer the issue of whether particular evidence should be received *in camera*, although "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted," *Meyers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). Further, although an administrative agency, no less than a court, is entitled to a presumption that it will act properly and according to law,[19] the order necessarily assumed that if the issue were presented to the presiding officer he would decide it improperly.

It is no answer to say that the District Court did not finally decide that the evidence must be kept confidential, but only deferred that determination until the taking of the evidence was completed and the record again submitted to judicial review.

As the Commission points out, there was a determination that there would be no disclosure in the interim, and that the [fol. 332] benefits of public hearings should be lost at least during this period without any showing that secrecy was in fact justified. During this period the Commission could not make the evidence available to Congress [20] and others outside the agency having a continuing, legitimate interest in the problems involved; and the Commission would be denied the benefit of evidence from others in the industry, stimulated by the testimony of these witnesses, and serving to verify, amplify or contradict it. And the period of concealment would inevitably be long—Schreiber and MCA appeared before the presiding officer in response to subpoena on October 21, 1960, and the issues then raised are not yet resolved.

Moreover, the court's order requires the Commission

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[19] In re Groban, 352 U.S. 330, 336 (1957) (Frankfurter, J., concurring).

[20] The Commission is required to report annually to Congress "such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of . . . radio communication . . . ." 47 U.S.C.A. §154(k)(1).

ultimately to establish the specific need for publication,[21] thus shifting the burden of justification away from the person seeking concealment, where it properly rests.[22]

Analogies[23] drawn from authorities under Rules 30(b) and 45(b) and (d) of the Federal Rules of Civil Procedure [fol. 333] demonstrate the soundness of the presiding officer's decision, and the error in the District Court's contrary ruling.

Under these authorities, a person seeking a protective

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[21] The court's order provided, "the Commission . . . may move the court upon the conclusion of such interrogation and production for an order, should good cause exist therefor, permitting such testimony and documents to be made public . . . ."

[22] See note 14 supra.

[23] Rule 81(a)(3) provides that the Federal Rules of Civil Procedure apply "to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States . . . ." It was held in Boeing Airplane Co. v. Coggeshall, 280 F.2d 654 (D.C.Cir. 1960), that because of this provision of Rule 81(a)(3) the limitations found in Rules 39(b) and 45(b) and (d) are directly applicable to administrative subpoenas. This result, however, fails "to observe the important distinction between the administrative proceeding . . . and the court action to enforce the summons . . . Rule 81(a)(3) makes the Rules of Civil Procedure applicable . . . to the court action to enforce the summons . . . To contend that the proceeding itself before the Commissioner . . . is also a civil case subject to the Rules of Civil Procedure . . . would be going too far." Falsone v. United States, 205 F.2d 734, 742 (5th Cir. 1953). See also 7 Moore's Federal Practice §81.06 [1] (2d ed. 1955); 5 Moore's Federal Practice §45.01 [2] (2d ed. 1951); 2B Barron & Holtzoff, Federal Practice & Procedure 281-82 (Rules ed. 1961). It therefore appears that decisions under Rules 30(b) and 45(b) and (d) are applicable to protective orders with respect to administrative subpoenas only by way of analogy. This would be true whether the protective order is sought from the agency or the court.

order in discovery proceedings has the burden of justifying it; and a general assertion that business secrets may be disclosed is not enough.[24] Ordinarily, the questioning of witnesses and production of documents will not be limited in advance on the ground that disclosure of privileged material may be sought. The court will not speculate as to what data may actually be requested. The privilege must be asserted when specific demands are made.[25] And discovery should not be interrupted while application is made for a protective order as to each demand; it should be completed, and all questions of privilege submitted to the court in a single application which can then be evaluated in light of the full record.[26]

[fol. 334] As a whole, these rules suggest the wisdom of restraint in the issuance of anticipatory protective orders to avoid premature and probably needless interference with

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[24] See, e.g., Sacks v. Frank H. Lee Co., 18 F.R.D. 500 (S.D.N.Y. 1955); Technical Tape Corp. v. Minnesota Mining & Mfg. Co., 18 F.R.D. 318, 322 (S.D.N.Y. 1955); 4 Moore's Federal Practice 2024, 2034 n. 1a (2d ed. 1963); 2A Barron & Holtzoff, Federal Practice & Procedure 235-36 (Rules ed. 1961). See also 8 Wigmore, Evidence §2212 (McNaughton rev. 1961).

[25] See, e.g., Alexander's Dep't Stores Inc.. v. E. J. Korvette, Inc., 198 F.Supp. 28, 29 (S.D.N.Y. 1961); Brockway Glass Co. v. Hartford-Empire Co., 36 F.Supp. 470, 472 (W.D.N.Y. 1941); Nekrasoff v. United States Rubber Co., 27 F.Supp. 953, 956 (S.D.N.Y. 1939); Independent Prods. Corp. v. Loew's, Inc., 22 F.R.D. 266, 279 (S.D.N.Y. 1958), and 28 F.R.D. 19, 21 (S.D.N.Y. 1961); Shiner v. American Stock Exch., 28 F.R.D. 34 (S.D.N.Y. 1961); Continental Distilling Corp. v. Humphrey, 17 F.R.D. 237, 241, (D.D.C. 1955); United States v. Lustig, 16 F.R.D. 138 (S.D.N.Y. 1954); Folley Amusement Holding Corp. v. Randforce Amusement Corp., 1 F.R.D. 496, 498 (S.D.N.Y. 1940); 4 Moore's Federal Practice 1294.

[26] See, e.g., Young v. Motion Picture Ass'n of America, Inc., 28 F.R.D. 2, 5-7 (D.D.C. 1961); Smith v. Crown Publishers Inc., 14 F.R.D. 514 (S.D.N.Y. 1953); Jacobowitz v. Kremer, 7 F.R.D. 110, 111 (S.D.N.Y. 1946).

the process of discovery. This underlying premise applies with special force to the present case for here the District Court was not dealing with an application for a protective order by a party subjected to unsupervised discovery, but rather with a review of a determination made by a neutral presiding officer in a specialized administrative proceeding. Application for orders protecting trade secrets under Rules 30(b) and 45(b) and (d) are directed largely to the discretion of the trial judge,[27] but it was the presiding officer (by analogy) who stood in this position, not the District Court.

The discretion vested in the presiding officer was not abused by the denial, on this record, of the demand for blanket nondisclosure.

II

It may be conceded that witnesses before purely investigative bodies have no constitutional right to the aid of an attorney.[28]

However, the language and legislative history of Section 6(a) of the Administrative Procedure Act indicate that Congress intended to grant to witnesses [29] compelled to appear in agency investigations [30] the right to be accompanied,

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[27] See A. H. Robins Co. v. Fadley, 299 F.2d 557, 561-62 (5th Cir. 1962).

[28] See In re Groban, 352 U.S. 330, 333 (1957). See also Anonymous v. Baker, 360 U.S. 287 (1959).

[29] The first sentence of §6(a) (5 U.S.C.A. §1005(a)) applies to "any person compelled to appear" as distinguished, in the second sentence, from "Every party." The distinction is carefully preserved in comments on §6(a) in the House Committee Report, H.R. Rep. No. 1980, 79th Cong., 2d Sess. 31-32 (1946), reprinted in S.Doc. No. 248, 79th Cong., 2d Sess. 263-64 (1946), and by Senator McCarran on the floor of the Senate. 92 Cong.Rec. 2156 (1946).

[30] The provisions of §26 apply broadly "except as otherwise provided" in the Act, and the §6(a) right to counsel is accorded whenever a person is "compelled to appear in person before any agency or representative thereof," with-

[fol. 335] represented, and advised by counsel." This view is supported by all the decided cases [31] and by the leading

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out qualification as to the type of agency proceeding which may be involved, in contrast, for example, with §7 which by its terms is limited to rule-making and adjudicatory proceedings under §§4 and 5. The House Committee Report stated that §6(a) "is a statement of statutory and mandatory right of interested persons to appear themselves or through or with counsel before any agency in connection with any function, matter, or process whether formal, informal, public, or private." H.R. Rep. No. 1980, 79th Cong., 2d Sess. 31-32 (1946), reprinted in S. Doc. No. 248, 79th Cong., 2d Sess. 263-64 (1946).

[31] See Backer v. Commissioner, 275 F.2d 141 (5th Cir. 1960); Wanderer v. Kaplan, D.D.C., Civil No. 2819-62, Oct. 30, 1962, 1962 CCH Trade Cases ¶¶70462 and 70535; Hall v. Lemke, N.D. Ill., Civil No. 62C942, May 7, 1962, 1962 CCH Trade Cases ¶70338 (restraining order), see Comment, 72 Yale L.J. 1227 (1963); In re Neil, 209 F.Supp. 76 (S.D. W.Va. 1962); United States v. Fancher, 195 F.Supp. 448, 457 n. 18 (D.Conn. 1961); Application of Levine, 149 F.Supp. 642, 643 (S.D.N.Y. 1956); and United States v. Smith, 87 F.Supp. 293, 294 (D.Conn. 1949). See also In re Mead Corp., No. 571-0656, FTC, Jan. 3, 1963, 13 Pike & Fischer, Admin. Law (2d) 117 (1963). Cf. Torras v. Stradley, 103 F.Supp. 737, 739 (N.D. Ga. 1951).

In context the statement in Hannah v. Larche, 363 U.S. 420 (1960) at 445, that agencies when making quasi-judicial determinations are subject to the Administrative Procedure Act, does not mean that the Court thought the Act as a whole was inapplicable to investigative hearings. When at 452-53 the Court rejected the argument that §7 of the Act applied to the investigative hearings of the Civil Rights Commission, it did not do so on the ground that the Act as a whole was inapplicable to such hearings, but rather upon the narrow ground that §7 by its terms applied only to rule-making and adjudication.

commentaries on the Act.[32] Schreiber and MCA were therefore entitled to whatever assistance of counsel Sec-

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[32] The Administrative Conference of the United States (created pursuant to Exec. Order No. 10934, Apr. 13, 1961) recently indicated that in its view §6(a) was applicable "in all agency actions and proceedings, including both public and non-public investigations." Bull. No. 7, Administrative Conference of the United States, July 2, 1962, titled "Report of the Fourth Plenary Session, June 29, 1962," p. 4.

The Attorney General's Manual on the Administrative Procedure Act (1947) states (61-62) that §6(a):

> . . . restates existing law and practice that persons compelled to appear in person before an agency or its representatives must be accorded the right to be accompanied by counsel and to consult with or be advised by such counsel. Such persons are also entitled to have counsel act as their spokesmen in argument and where otherwise appropriate. Senate Comparative Print of June 1945, p. 10 (Sen.Doc. p. 26). It is clear, of course, that this provision relates only to persons whose appearance is compelled or commanded, and does not extend to persons who appear voluntarily or in response to mere request by an agency. Where appearance is compelled, whether as a party or as a witness, the right to counsel exists.

The Report of the Commission on Organization of the Executive Branch of Government, Task Force Report on Legal Services and Procedure (1955) states (287-88):

> This [Section 6(a)] right was to be accorded in connection with any function, matter, or process, whether formal, informal, public, or private.
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> Agency restrictions upon the freedom of a witness or a party to be represented by an attorney in good standing or other duly qualified person in administrative proceedings, whether investigatory or adjudicatory, not only contravene an important purpose of the Adminis-

[fol. 336] tion 6(a) conferred, and, in this court, the Commission has not contended to the contrary.[33]

It is unnecessary, in this case, to spell out all that "the right to be accompanied, represented, and advised by counsel" may comprehend. The District Court held that in a purely investigatory proceeding of the type involved here, Section 6(a) did not confer the right to cross-examine other witnesses, and Schreiber and MCA have not appealed from this determination. On the other side, the Commission allowed counsel for Schreiber and MCA to present and argue motions in advance of public hearings and to accompany Schreiber while the latter testified; and on this appeal the Commission has stated that it does not challenge the District Court's determination that counsel must also be permitted to "initiate advice to his client with respect to the propriety or legality of any question asked of his client and to advise [fol. 337] his client not to answer any such question deemed improper."[34]

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trative Procedure Act, but also derogate from due process of law in the administrative process.

The pertinent portions of 1 Davis, Administrative Law §8.10 (1958) are set out in this court's opinion.

See also Murchison, Rights of Persons Compelled to Appear in Federal Agency Investigational Hearings, 62 Mich.L.Rev. 485, 492-93 (1964); 26 Albany L.Rev. 276, 277-78 (1962); Newman, Federal Agency Investigations; Procedural Rights of the Subpoenaed Witness, 60 Mich.L. Rev. 169, 170-71 n. 12 (1961-1962); Newman, What Agencies Are Exempt from the Administrative Procedure Act, 36 Notre Dame Law 320 (1960-1961); Gellhorn & Byse, Administrative Law 595 (4th ed. 1960); 58 Colum.L.Rev. 395, 403-04 (1958).

[33] At the oral argument the court asked, "You do not argue that it [§6(a)] is inapplicable to investigative proceedings?" Counsel for the Commission replied, "We do not, your Honor, we do not."

[34] Paragraph 3(c) of the order. See note 4 of this court's opinion. This concession seems required by the literal language of §6(a): the right to be "advised by counsel" must mean at least this.

Thus the only issue presented on this aspect of the appeal is the validity of that portion of the District Court's order holding that Section 6(a) confers the right to have counsel object to questions put to his client, and state on the record concise grounds for such objections.

The ordinary meaning[35] of the phrase "represented . . . by counsel" would seem to imply this much. Indeed, to object to questions asked of a witness-client, and articulate the legal basis for the objections, is the function the witness-client would be most likely to expect his attorney to perform, for it is within the attorney's exclusive competence.

The word "representer" was a deliberate addition to Section 6(a), and there is some evidence that it was added to enable counsel to communicate his advise to the presiding officer as well as to his client. A comment upon the insertion of the word, appearing in a Senate Judiciary Committee Print, suggests that "even where the party must be personally present : . . the representation by counsel may be helpful both to the agency concerned and the party."[36] And the statement in the Attorney General's Manual on the Administrative Procedure Act (1947) at page 61 that persons compelled to appear before an agency "are also entitled to have counsel act as their spokesmen in argument and where otherwise appropriate," conveys the same notion. In the course of the Congressional debate the right to counsel conferred by Section 6(a) was stated in the broadest terms.[37]

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[35] "When Congress used the terms 'right to be accompanied, represented, and advised by counsel,' it must have used the language in the regularly accepted connotation . . . ." Backer v. Commissioner, 275 F.2d 141, 144 (5th Cir. 1960).

[36] Senate Judiciary Committee Print issued May 1945, reprinted in S.Doc. No. 248, 79th Cong., 2d Sess. 26 (1946).

[37] Congressman Francis Walters stated on the floor of the House (92 Cong.Rec. 5652 (1946)):

> Section 6(a) deals with the right of parties to have the advice or representation of counsel or, to the extent that agencies lawfully permit it, representation by non-lawyers. The representation of counsel contemplated by the bill means full representation as the term is

[fol. 338] The Administrative Conference of the United States recently addressed itself to the precise question raised here. The Conference concluded: [38]

> The right to be "represented" by counsel means as a minimum that counsel for any person compelled to appear in person shall be permitted to make objections on the record and to argue briefly the basis for such objections in connection with any examination of his client.

The Supreme Court's "approval" in *Hannah* v. *Larche*, 363 U.S. 420 (1960), of Rule 1.40 of the Federal Trade Commission's Rules of Practice (which allowed counsel for a subpoenaed witness to accompany and advise his client but "not, as a matter of right, otherwise participate in the investigation") is not inconsistent with this reading of Section 6(a). In *Hannah* the Supreme Court was commenting only upon whether Rule 1.40 met constitutional standards, not whether it satisfied Section 6(a) of the Administrative Procedure Act.[39] The Court referred with equal "ap-

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understood in the courts of law. Counsel may thus receive notices, decisions, and awards. Agencies are not authorized in any manner to ignore or bypass legal representatives that parties have selected for themselves pursuant to this section.

[38] Bull. No. 7, Administrative Conference of the United States, July 2, 1962, titled "Report of the Fourth Plenary Session, June 29, 1962," p. 4. See Murchison, Rights of Persons Compelled to Appear in Federal Agency Investigational Hearings, 62 Mich.L.Rev. 485, 496 (1964).

[39] Murchison, Rights of Persons Compelled to Appear in Federal Agency Investigational Hearings, 62 Mich.L.Rev. 485, 493 (1964). After *Hannah* the Federal Trade Commission modified its rules to permit counsel, in public investigatory proceedings, to object to questions asked of his witness-client, to advise his client not to answer, and to state his reasons on the record. The Commission broadened witnesses' rights to the assistance of counsel in other respects, and indicated that it did not act wholly under the compulsion of §6(a). It stated, however, "We are convinced that these rules effectuate the policy of Congress, and will not con-

proval'' to the practice of the Securities and Exchange Commission limiting the role of counsel for witnesses in investi- [fol. 339] gative inquiries to advising the witness and "making objections to questions which assertedly exceed the scope of the order of investigation.'' 363 U.S. at 447 n.26.

The Commission contends that since "representation'' is not defined in the Administrative Procedure Act, the degree of participation by counsel which is to be permitted should be left to the discretion vested in the Commission by Section 4(j) of the Communications Act of 1934, and that the determination which the Commission has made as to the extent of participation to be allowed in the present case is reasonable in the light of the type of inquiry involved, and not an abuse of discretion.[40]

Unquestionably a large measure of discretion over its procedures is vested in the Commission, as has been noted.[41] But the authority conferred upon the Commission by Section 4(j) of the Act of 1934 is limited by Section 6(a) of the Administrative Procedure Act.[42] The latter "is a statement of statutory and mandatory right.'' H.R. Rep. No. 1980, 79th Cong., 2d Sess. 31-32 (1946), reprinted in S.Doc. No. 248, 79th Cong., 2d Sess. 263-64 (1946). Precisely what the right to be "represented . . . by counsel'' comprehends may depend to some extent upon the nature of the inquiry, and other surrounding circumstances, but it cannot reason-

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tribute to any 'regulatory lag' or delay investigational hearings.'' In re Mead Corp., No. 571-0656, FTC, Jan. 3, 1963, 13 Pike & Fischer, Admin. Law (2d) 117, 122 (1963). See 16 C.F.R. §1.40.

[40] Since the Commission has conceded that counsel should be permitted to advise his client not to answer, and that the client may then state his position on the record, it is difficult to credit the Commission's repeated suggestion that the elimination of this circumlocution by permitting counsel himself to object and concisely state his reasons on the record "would tend to make the investigation interminable.''

[41] Notes 6 and 10, supra, and related text.

[42] American Communications Ass'n v. United States, 298 F.2d 648, 650 (2d Cir. 1962).

ably import less, as to a witness in an investigative proceeding, than the right to have counsel object to questions put to the witness and state his reasons in the record; "otherwise," as Judge Yankwich stated at the hearing below, "it does not mean anything." [43]

[fol. 340] IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17990

FEDERAL COMMUNICATIONS COMMISSION, Appellant,

vs.

TAFT B. SCHREIBER AND MCA, INC., Appellees.

JUDGMENT—Filed and entered February 17, 1964

Appeal from the United States District Court for the Southern District of California, Central Division

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division — and was duly submitted.

On Consideration whereof, It is now here ordered and adjudged by this Court, that the — judgment of the said District Court in this Cause be, and hereby is affirmed, except that subparagraphs (b) and (c) of paragraph VII of the Conclusions of Law are stricken and the order of the said District Court is modified to conform to the opinion of this Court.

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[43] Judge Yankwich's decision as to the meaning of §6(a) was followed in all particulars by Judge McLaughlin in Wanderer v. Kaplan, D.D.C., Civil No. 2819-62, Oct. 30, 1962, 1962 CCH Trade Cases ¶70535.

[fol. 340a] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17990

FEDERAL COMMUNICATIONS COMMISSION, Appellant, Cross-Appellee,

v.

TAFT B. SCHREIBER AND MCA, INC., Appellees—Cross-Appellants.

[fol. 340b] PETITION FOR REHEARING EN BANC—Filed March 28, 1964

To the Honorable Judges Jertberg and Browning, Circuit Judges, and Foley, Jr., District Judge:

On February 17, 1964, a panel of this Court decided, *inter alia*, that the district court did not abuse its discretion in ordering that certain evidence be received by the Federal Communications Commission in confidence. In so ruling, we respectfully submit, the majority of this Court's panel completely misconceived the question before it, attributing to the Commission a statement of the issue that it did not make. For this reason, and particularly because the majority's disposition of the issue as it conceived it did not at all go to the issue actually presented, we respectfully submit that this matter be reheard *en banc*.

1. The case emanates from a proceeding commenced by the Commission to investigate "the policies and practices pursued by the [television] networks and others in the acquisition, selection, sale and licensing of programs for television exhibition, and the reasons and necessity in the public interest for said policies and practices * * *." 24 F.R. 1605. This investigation was undertaken pursuant to the Independent Offices Appropriation Act of 1955, 69 Stat. 201-02, (1) to determine what, if any, rules, regulations, legislation, or other actions are necessary or desirable in the public interest, including larger and

more effective use of television, and (2) to report to Congress information pertinent to regulation of broadcasting, as is required by 47 U.S.C. 154(k)(1).[1]

Subpoenas were issued to MCA Inc. and Schreiber, one of its officers, to appear at a public hearing and to produce certain documents. MCA is a major producer and packager [fol. 340c] of television programs.[2] MCA and Schreiber refused to testify and produce certain documents without guarantees of confidentiality. The Commission had prescribed a procedure for requesting confidentiality, allowing the examiner to grant confidential treatment for good cause shown. Both the examiner and the Commission denied the request for confidentiality here, holding that no case was made before them justifying, on balance of all factors, an extraordinary departure from the usual procedure of public hearings.[3] The district court granted the Commission's request for enforcement of the subpoenas, but conditioned upon the holding in confidence of all information to be obtained from MCA and Schreiber unless and until the Commission showed the court good cause for making public such information.

2. The majority's statement that the Commission contended that the *district court* abused *its* discretion in direct-

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[1] See Hearings, Senate Committee on Appropriations, Independent Office Appropriations, 1956, p. 293.

[2] See pp. 17-18, Commission's opening brief.

[3] Concerning the case made before the examiner, the Commission stated: "Evidence similar to that sought from the other petitioners was freely given by another person engaged in a similar business. It appears further that, in eliciting testimony and requesting data from such other persons, the Presiding Officer and Commission counsel have made every effort to avoid public disclosure of detailed internal financial information or detailed contractual arrangements which might in fact irreparably harm private interests or the public. We concur in the Presiding Officer's finding on this record that there is nothing of a confidential nature in the matters sought to be elicited from these petitioners which would require that their testimony be made part of the non-public docket."

ing confidentiality misconceives the Commission's position. Rather, the Commission contends that an administrative agency must determine in the first instance whether information received by it in a duly authorized investigation should be kept from the public and from Congress. Responsibility and hence discretion lie initially with the administrative agency. A district court may intervene—even in the form of conditioning enforcement of a subpoena—only for [fol. 340d] arbitrariness on the part of that agency.

As developed in our briefs to the panel, there is a strong public policy in favor of open and public administrative hearings. *E. Griffith Hughes, Inc.* v. *FTC*, 63 F. 2d 362 (C.A.D.C.). As the Commission itself pointed out, open and public hearings are necessary so that (1) all interested parties may be aware of the factual basis for any action, legislation, rulemaking, or licensing, which the Commission may take as a result of the investigation, and (2) any person may be able to come forward to verify, refute, explain, or amplify evidence already given.

Indeed, the very statute authorizing the issuance and enforcement of the subpoena contemplates public proceedings. In 47 U.S.C. 154(j) Congress expressly provided that "proceedings" of the Commission "shall be public upon the request of any party interested." This rule prevails even where the Commission institutes an investigation on its own motion. 47 U.S.C. 403; see 47 U.S.C. 412. Recognizing that extraordinary situations may require reception of evidence *in camera*, Congress left it to the Commission to strike the balance between factors favoring public disclosure and those militating against it. 47 U.S.C. 154(j); see Sec. 3(a), Administrative Procedure Act, 5 U.S.C. 1002(a), and 47 U.S.C. 412.

In addition, the Commission has the duty to report to Congress "such information and data collected" which "may be considered of value in the determination of questions connected with" the matters under its jurisdiction. 47 U.S.C. 154(k)(1). This generalized duty was made specific in the legislative history of the Act providing for the investigation with which we are here concerned. The investigation was needed, explained Senator Magnuson, the Committee Chairman, "because we will be able to draw upon the facts which are obtained by an examination of the

[interrelating] contracts of the industry" 101 Cong. Rec. 7629.[4] The fulfillment of this duty is still another reason [fol. 340e] why the discretion to balance the reasons for public proceedings as against those for *in camera* sessions should be left with the Commission. However, the panel's decision that the district court may exercise its discretion *de novo* subjects the congressional right to know to judicial limitation on the basis of one judge's discretion in the matter.

Moreover, both Congress and the Commission's order of procedure in this case, as well as sound reasoning, place that burden on the proponent of an extraordinary departure from the usual practice of open proceedings. See 5 U.S.C. 1006(a). It is the Commission's position that MCA and Schreiber failed to meet this burden where it lie—before the Commission. See note 3, *supra*. The district court shifted the burden to the Commission, ruling that matters should be held *in camera* until the Commission established good cause for their release to the public and to Congress. Although the Commission urged that the district court erred in so shifting the burden, the majority of this Court's panel never considered that question.

These are the issues that were before the panel of this Court, and to which the majority did not address itself. The Commission, having the responsibility of striking the balance between usual public hearings and extraordinary *in camera* sessions, was subject to being overruled by the judiciary only for arbitrariness. *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 146. But, as Judge Browning pointed out, no showing of arbitrariness has been made. Indeed, respondents made no showing at all before either the Commission or the district court that trade secrets were involved. And the district court ignored completely the reasons for open and public hearings given by the Commission. Finally, the district court's order applies to *all* evidence to be received from MCA and Schreiber; there is no limitation to trade secrets.

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[4] See also House Appropriation Committee, Hearing on Independent Agencies Appropriation, 1956, p. 665.

[fol. 340f] In attributing to the Commission the contention that the district court should be reversed for abuse of *its* discretion, the panel misconceived the Commission's position. By ruling *sub silento* that the district court rather than the Commission has the discretion to strike the balance in the first instance, and that the burden is on the Commission to prove a case for public proceedings, the majority erroneously permitted the district court to invade an area of decision making reserved by Congress initially to the Commission. And this error, committed under a misconception of the issues before it and without opinion, will cause interference with the open proceedings of this Commission and other agencies and with their ability to fulfill their statutory duty to Congress.

A hearing *en banc* is therefore warranted.

Respectfully submitted, John W. Douglas, Assistant Attorney General, Francis C. Whelan, United States Attorney, Sherman L. Cohn, Harvey L. Zuckman, Attorneys, Department of Justice, Washington, D.C., 20530.

Max D. Paglin, General Counsel, Federal Communications Commission, Henry Geller, Deputy General Counsel, Federal Communications Commission, John J. O'Malley, Jr., Attorney, Federal Communications Commission, Washington, D. C.

March, 1964.

[fol. 341] IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before: JERTBERG and BROWNING, Circuit Judges; and FOLEY, JR., District Judge.

MINUTE ENTRY OF ORDER DENYING PETITION FOR REHEARING EN BANC—May 4, 1964

On consideration thereof, and by direction of the Court, It is Ordered that the petition of appellant Federal Communications Commission filed March 28, 1964, and within time allowed therefor by rule of Court, and valid extension thereof, for a rehearing of above cause be, and hereby is denied.

[fol. 342] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 343] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1964

No.

FEDERAL COMMUNICATIONS COMMISSION, Petitioner,

vs.

TAFT B. SCHREIBER AND MCA, INC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—August 3, 1964

Upon Consideration of the application of counsel for petitioner,

It is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 10th, 1964.

Earl Warren, Chief Justice of the United States.

Dated this 3rd day of August, 1964.

[fol. 344] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1964

No. 482

FEDERAL COMMUNICATIONS COMMISSION, Petitioner,

v.

TAFT B. SCHREIBER, et al.

ORDER ALLOWING CERTIORARI—December 7, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. —

~~UNITED STATES OF AMERICA AND~~ FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

TAFT B. SCHREIBER AND MCA, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the ~~United States and the~~ Federal Communications Commission, prays that a writ of certiorari issue to review the judgment entered on February 17, 1964, by the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (Appendix A, pp. 13–57, *infra*) are reported at 329 F. 2d 517. The opinion of the district court appears at 201 F. Supp. 421.

JURISDICTION

The judgment of the court of appeals (Appendix B, p. 58, *infra*) was entered on February 17, 1964. A timely petition for rehearing *en banc* was denied (Appendix C, p. 59, *infra*) on May 4, 1964. On Au-

gust 3, 1964, the Chief Justice granted an extension of time within which to file a petition for a writ of certiorari to and including September 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has authority, subject only to judicial scrutiny for abuse of discretion, to determine if testimony given and documents received pursuant to subpoena at an authorized investigatory hearing should be kept confidential.

2. Whether the Commission may impose the burden of justifying confidentiality for information received at such a hearing on the witness who requests secrecy.

STATUTES INVOLVED

The pertinent portions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, and the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001, are set forth in Appendix D, pp. 60–63, *infra*.

STATEMENT

This petition seeks review of a judgment affirming a district court order requiring information sought by the Federal Communications Commission in the course of its investigation of the television industry to be held in confidence. The underlying facts may be briefly summarized:

1. The Federal Communications Commission, like other regulatory agencies, is authorized (see Section

403 of the Federal Communications Act) to conduct inquiries concerning "any matter" relating to any of its responsibilities. 47 U.S.C. 403. The Commission also has the duty to report to Congress "such information and data collected" which "may be considered of value in the determination of questions connected with" the matters under its jurisdiction. 47 U.S.C. 154(k). In 1955, Congress appropriated money for an investigation by the Commission of radio and television network broadcasting. Independent Offices Appropriation Act, 1956, 69 Stat. 199, 201.

In connection with this investigation, the Commission ordered a hearing into "the policies and practices pursued by the [television] networks and others in the acquisition, ownership, production, distribution, selection, sale and licensing of programs for television exhibition, and the reasons and necessity in the public interest for said policies and practices * * *." 24 F.R. 1605. In its order the Commission noted that the information it sought to obtain was necessary (1) as a part of its general investigation of television programs undertaken pursuant to the Independent Offices Appropriations Act, (2) to determine what, if any, rules, regulations, legislation, or other actions were necessary or desirable in the public interest in connection with television programming, (3) to determine the steps necessary to encourage larger and more effective use of television in the public interest, (4) to determine where the public interest lies in the granting of construction permits, station licenses, and modifications and renewals, (5) to report to Congress on matters

relating to the regulation of broadcasting, and (6) to build a public record on which both Congress and the Commission might act.

The Commission authorized its chief hearing examiner to conduct the investigation. He was empowered to subpoena witnesses, compel their attendance, and require the production of papers deemed relevant to the inquiry. The investigatory proceeding was to be "a public proceeding except that the said presiding officer may order non-public sessions of the said investigatory proceeding where and to the extent that the public interest, the proper dispatch of the business of said proceeding or the ends of justice will be served thereby" (R. 24).

In the course of the inquiry public sessions were held in Los Angeles, California, at which evidence was received concerning the functions, policies and practices of a number of television production companies, talent agencies, program packagers[1] and others. Respondent MCA, Inc., produces, packages, and finances TV programs; respondent Schreiber is an officer of MCA. The examiner, by subpoena, ordered both respondents to appear at a hearing and to produce certain books, papers and documents whose pertinence to the inquiry has never been questioned.

Schreiber appeared at the hearing and produced some of the requested material. He refused, however, to produce other subpoenaed material which

[1] A "packager" assembles the talent and scripts for a particular TV program or series. A producer has charge of the process of preparing the package.

was in his possession, and to testify concerning these documents, asserting that they were "confidential." He agreed to testify and to produce the documents only "if the Commission will take this information and assure us that it will be held confidential, will not be published, and will not be made available to other people, other than those on the Commission, and that serve the Commission * * *" (R. 76). The claim to confidentiality was based on the contention that the matters sought were trade secrets, but no evidence was offered to establish that contention or to demonstrate that the disclosure of these matters would injure MCA. The examiner offered to keep the information confidential if it was demonstrated that information produced by MCA justified such confidential treatment. He refused, however, to receive the information under a binding commitment of secrecy, imposed in advance of production (R. 26). When directed to produce the remaining documents and to testify fully concerning the matters under investigation, Schreiber refused to proceed and left the witness stand (R. 14).

The Commission affirmed the examiner and ordered respondents to appear, testify and produce the documents at a reconvened hearing. It explained its earlier conclusion that "public proceedings should be the rule" on the ground that the subject matter of the inquiry was of concern to Congress, to station licensees, and to other segments of the industry and the public. The processes involved in the production, sale and distribution of tele-

vision programming were, the Commission stated, "complex and generally unknown." In order intelligently to assess the information obtained, it concluded that it would be "highly desirable that the facts, information, data and opinion supplied by one group or individual be known to other groups and individuals involved, so that they may verify, refute, explain, amplify or supplement the record from their own diverse points of view." The Commission's order nonetheless provided that the presiding officer was empowered to proceed *in camera* if it was shown that public disclosure would irreparably damage private competitive interests and if such injury outweighed the considerations favoring open hearings (R. 12–13). Respondents continued in their refusal to comply, and contended that all testimony and documentary evidence should be received in private sessions.

2. The Commission thereupon petitioned the district court for the enforcement of its subpoena and orders pursuant to Section 409 (f) and (g) of the Federal Communications Act. The district court enforced the order with a qualification. In light of respondents' fear that public disclosure of the information sought "might result in disclosure of trade-secrets, of which competitors might take advantage" (201 F. Supp. 421, 425), the court directed the examiner and the Commission to hold confidential all information submitted unless and until the Commission, in an adversary proceeding, showed the court good cause to divulge it.

The court of appeals, Judge Browning dissenting, affirmed the district court's order insofar as it pertained to the questions raised by this petition. The majority held that the district court had discretion to impose conditions on the enforcement order sought by the Commission, and that this discretion had not been abused. Judge Browning was of the view that the determination whether the subpoenaed information should be kept confidential was, in the first instance, to be determined by the Commission. He agreed with the Commission that the burden of justifying confidentiality rested with those who oppose disclosure and concluded that the district court should have limited its review to deciding whether the Commission had abused its discretion in this regard.[2]

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit's decision takes from the Federal Communications Commission and gives to the district court the discretion to determine, in the first instance, the degree of confidentiality to be accorded information sought by the Commission, and it places upon that agency the burden of justifying public disclosure of such information. This holding has

[2] In another aspect of the case below, the majority, Judge Browning dissenting, agreed with the Commission that counsel for witnesses testifying at non-adjudicatory investigatory hearings may properly be limited to giving advice to their client, and not given the opportunity to object to questions and state the grounds of objection. On September 2, 1964, the Commission adopted an amendment to its rules of procedure allowing counsel to state objections on the record and briefly state the basis for such objections (Appendix E, pp. 64–65, *infra*).

far-reaching consequences for all federal administrative agencies. In order that the independent regulatory agencies may advise Congress of facts pertaining to the industries they regulate, and also to enable the agencies themselves to adopt meaningful administrative regulations, Congress has almost invariably conferred upon them the authority to conduct investigatory proceedings.[3] A necessary corollary of the power to conduct such investigations is the authority to communicate the conclusions and underlying findings to Congress or other interested governmental agencies. There is, consequently, a strong public interest in the public dissemination of information obtained as a result of such investigations. On the other hand, in some circumstances there may well be an overriding private interest which would justify protecting particular information obtained from a witness against unfair use by his business competitors.

The striking of the balance between these interests has generally been entrusted, in the first instance, to

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[3] *E.g.*, Section 6 of the Federal Trade Commission Act of 1914, 15 U.S.C. 46; Section 161(c) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2201(c); Sections 4 and 307 of the Federal Power Act, as amended, 16 U.S.C. 797 (a) and (d), 825f; and Section 14 of the Natural Gas Act, 15 U.S.C. 717m; Section 1002(b) of the Federal Aviation Act of 1958, 49 U.S.C. 1482(b); Section 313(c) of the Federal Aviation Act of 1958, 49 U.S.C. 1354(c); Section 12 of the Interstate Commerce Act, as amended, 49 U.S.C. 12. Professor Davis has noted that "often Congress or congressional committees utilize existing agencies for conducting investigations. Whether or not instituted at the instance of Congress, administrative investigations often lead to legislation." 1 Davis, *Administrative Law Treatise* 167 (1958).

the investigating agency.[4] The Federal Communications Act, while containing no specific provision regarding *in camera* proceedings generally,[5] empowers the Federal Communications Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. 154(j). This language was construed in *Federal Communications Commission* v. *WJR*, 337 U.S. 265, 282 as "[leaving] largely to [the Commission's] judgment the determination of the manner of conducting its business * * *." See also *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143.

The Ninth Circuit's decision authorizes the district court to exercise its discretion on the issue of confidentiality *vel non* irrespective of the prior decision of the Commission. It also casts on the Commission the burden of establishing to the satisfaction of the district court that the information should be publicly revealed. In both respects the decision interferes with the administrative process and violates the

[4] *E.g.*, Section 6(f) of the Federal Trade Commission Act of 1914, 15 U.S.C. 46(f); Section 161(p) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2201(p); Section 308(b) of the Federal Power Act, as amended, 16 U.S.C. 825g(b) and Section 15 of the Natural Gas Act, 15 U.S.C. 717n(b); Section 1001 of the Federal Aviation Act of 1958, 49 U.S.C. 1481; Section 17(3) of the Interstate Commerce Act, as amended, 49 U.S.C. 17(3).

[5] It is of significance that although the statute authorizes the Commission "to withhold publication of records or proceedings containing secret information affecting the national defense," it does not deal expressly with the question of trade secrets. 47 U.S.C. 154(j)

statutory scheme, which contemplates that the agency will be the master of its own proceedings. By the same token, the court of appeals' approach, by shifting the primary responsibility from the agency to the judiciary, will impede the flow of information from the Commission to Congress. As noted above, the investigation in this very case was authorized by specific legislation; Senator Magnuson, the Appropriations Committee chairman, explained that the investigation was needed "because we [Congress] will be able to draw upon the facts which are obtained by an examination of the contracts" of the broadcasting industry. 101 Cong. Rec. 7629.[6]

2. The approach taken by the Ninth Circuit in this case conflicts with that of the District of Columbia Circuit in *American Sumatra Tobacco Corp.* v. *Securities and Exchange Commission*, 110 F. 2d 117, where it was argued that the agency erred in refusing confidential treatment to a profit and loss statement. The statute involved in that case provided that material should be made public unless there was "objection to the public disclosure" which "the Commission is authorized to hear * * * where it deems it advisable"—a procedure identical to that which the Commission sought to follow in the instant case. The court, refusing to consider *de novo* the appropriateness of confidential treatment, held (110 F. 2d at 120):

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[6] See also Hearings before the Subcommittee of the House Appropriations Committee, Independent Offices Appropriation for 1956, 84th Cong., 1st Sess., p. 665; Hearings before the Subcommittee of the Senate Appropriations Committee, Independent Offices Appropriations, 1956, 84th Cong., 1st Sess., p. 293.

> [I]f the question were before us as an original proposition, we could easily see our way to sustaining the objections to general publication. But the question is primarily not for us but for the Commission, and Congress unquestionably intended that the Commission should bring to bear upon the decision of this and like questions, what has been called in cases within the jurisdiction of the Interstate Commerce Commission, the knowledge and experience of experts. This does not by any means set up an inquisition destructive of the rights of the individual. The delegated power is not to be exercised arbitrarily or to be considered an unfettered discretion over the property of the citizen. Its exercise is subject to review. But so long as the Commission's decision rests on substantial evidence and on inferences which are not arbitrary and capricious, it should be sustained.

See also *American Sumatra Tobacco Corp.* v. *Securities and Exchange Commission*, 93 F. 2d 236, 239 (C.A.D.C.); *Bowles* v. *Baer*, 142 F. 2d 787 (C.A. 7); *Woolley* v. *United States*, 97 F. 2d 258 (C.A. 9).

We submit that the *American Sumatra* decision did not turn on any particular phrasing of the Securities and Exchange Act, but rather on considerations of policy which apply to all administrative agencies irrespective of the language of their authorizing statutes. That the principle is one of general applicability is demonstrated by the rules laid down in the Administrative Procedure Act and in the Federal Rules of Civil Procedure. Section 3(c) of the Administrative Procedure Act, 5 U.S.C. 1002(c), provides that "[s]ave as otherwise required by statute,

matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential *for good cause found.*" [Emphasis added.] This language appears to leave the initial decision to the agency and it clearly places the burden of demonstrating the need for confidentiality upon the party seeking it.[7] The burden is similarly placed on those seeking confidential proceedings in the district courts. Rule 30(b), Federal Rules of Civil Procedure; see *Sacks* v. *Frank H. Lee Co.*, 18 F.R.D. 500 (S.D.N.Y.).

CONCLUSION

The questions presented are of substantial public importance and the decision below adopts a view which is in conflict with that of other circuits. It is respectfully submitted that this petition for a writ of certiorari should be granted.

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Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

SHERMAN L. COHN,
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HENRY GELLER,
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JOHN H. CONLIN,
Attorney,
Federal Communications Commission.

SEPTEMBER 1964.

[7] In the present case, as Judge Browning observed, respondents' showing amounted only to a "naked assertion" that confidentiality was necessary (p. 43, *infra*).

APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 17,990

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT-CROSS-APPELLEE

vs.

TAFT B. SCHREIBER AND MCA, INC., APPELLEES-CROSS-APPELLANTS

[Feb. 17, 1964]

AN APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

Before: JERTBERG and BROWNING, *Circuit Judges;* and FOLEY, Jr., *District Judge*

FOLEY Jr., *District Judge.*

Appellant-Cross-Appellee will be referred to as the Commission and Appellees-Cross-Appellants jointly as Appellees and separately as MCA and Schreiber.

On February 26, 1959, by authority of 47 U.S.C. 403, the Commission published in the Federal Register (FR 1605) its order that an investigatory proceeding be instituted

> "* * * to determine the policies and practices pursued by the networks and others in the acquisition, ownership, production, distribution,

743-606—64——2

> selection, sale and licensing of programs for television exhibition, and the reasons and necessity in the public interest for said policies and practices * * *"[1]

In the order, the hearing examiner designated to conduct the investigatory preceedings was authorized to receive evidence and make a record thereof, to administer oaths, subpoena witnesses, to compel their attendance, and compel the production of documentary evidence.

The order closed with this paragraph:

> "IT IS FURTHER ORDERED, That the said investigatory proceeding shall be a public proceeding except that the said presiding officer may order non-public sessions of the said investigatory proceeding where and to the extent that the public interest, the proper dispatch of the business of said proceeding, or the ends of justice will be served thereby."

The record reflects that while public sessions were being held in Los Angeles, California, the examiner issued a subpoena duces tecum to Schreiber, MCA's

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[1] On November 10, 1959, the Commission entered a supplemental order as follows:

"NOW THEREFORE, IT IS ORDERED that the inquiry and investigatory proceeding instituted, pursuant to the Commission's Order of February 26, 1959, * * * be and is hereby amended and enlarged to determine the policies, practices, mechanics and surveillance pursued and carried out by networks, station licensees and others in connection with the acquisition, ownership, production, distribution, selection, sale and licensing of programs for radio and television exhibition and the policies and practices pursued by networks, station licensees and others in connection with the selection, presentation and supervision of advertising material for broadcast to the public and the reasons and necessity in the public interest for said policies and practices * * *"

24 F.R. 9275.

Vice President, commanding him to appear to testify and to produce documentary evidence described in the margin as Annex A and B.[2]

At the time and place appointed, Schreiber appeared with counsel and produced the list in Annex A, but refused to submit the material subpoenaed in

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[2] ANNEX

(A) A list by name or title of all television programs whether series programs, special programs, or otherwise, which appeared or were exhibited by or through the facilities of the television networks operated by NBC, CBS, or ABC since September 1, 1958, which programs were produced by MCA, Inc. or Revue Productions, Inc. and/or in which MCA, Inc. or Revue Productions, Inc. has or had a financial or proprietary interest or with regard to which MCA, Inc. or Revue Productions, Inc. is or was entitled to receive or has received a percentage of the profits or other compensation or fees in connection with the production or exhibition of such programs other than remuneration or compensation for the representation as agent of individual natural persons as talent.

(B) A list of all television programs whether series programs, special programs, or otherwise, which appeared on or were exhibited by or through the facilities of the television networks of NBC, CBS, or ABC, since September 1, 1958, in which MCA, Inc. or any predecessor affiliate or subsidiary of MCA, Inc. acted as packager [a] and/or, by agreement or otherwise, is entitled to receive or has received a percentage of the cost or selling price of said program or was or is entitled to receive or has received other compensation, remuneration or fees in connection with the packaging, licensing for broadcast or selling of said program, otherwise than as remuneration or compensation for the representation as agent of individual natural persons as talent.

[a] "The term 'packaging' is generally applied to the process of developing and assembling the talent and scripts for a particular program or programs. A producer has general charge of the physical processes by which the package is readied for television production." (This case below, FCC v. Schreiber, 201 F. Supp. 424.)

Annex B, although then and there in his possession, unless the Commission would accept said material on a confidential basis, contending that if the material was revealed at a public hearing, trade secrets would be disclosed. Schreiber further refused to testify while the hearing was public and unless his counsel be given the right to object and to state grounds of objection on the record. The examiner refused to close the hearing and to accept the subpoenaed material as confidential and directed that Schreiber's counsel not participate in the proceedings other than by being present and advising Schreiber.

Appellees petitioned the full Commission for review. The examiner was affirmed on all points and Schreiber was ordered by the Commission to produce Annex B and to testify publicly regarding the same.[3]

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[3] In its Order of January 27, 1961, affirming the Examiner, the Commission stated in part:

"It was the intention of the Commission in issuing both of the above Orders to institute a broad and comprehensive inquiry to establish a public record of the relevant policies, practices, facts and circumstances involved in the production, creation, selection, sale, licensing and exhibition of programs broadcast through the facilities of its licensees. Although the Commission empowered the Presiding Officer to accept evidence, information and data on a non-public basis, it was the Commission's express intent that the proceedings be public and that the record be available to the public, station licensees, the broadcast industry, to the Commission and to Congress. We think it clear that all of such groups have a proper interest in the complex and generally unknown processes involved in the production, sale, distribution, et cetera, of broadcast programming and, more particularly, in the factual basis for any action—legislative, rule-making or licensing—which the Com-

When Schreiber maintained the same position, the Commission sought enforcement in the court below pursuant to 47 U.S.C. §§ 401(a), 401(b), 409(f), and 409(g).

The learned trial Judge filed an opinion January 22, 1962, *FCC* v. *Schreiber*, 201 F. Supp. 421, and on March 2, 1962, filed his Findings of Fact, Conclusions of Law and Order.

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mission may take as a result of its inquiry into these matters. Moreover, the policies and practices into which inquiry is and has been made herein, involve many-sided transactions between diverse and partially competitive (but also partially complementary) components and members of the same industry, such as networks, advertising agencies, program producers, program packagers, talent agencies, etc. If we are to obtain a full and rounded picture of such transactions, it is highly desirable that the facts, information, data and opinion supplied by one group or individual be known to other groups and individuals involved, so that they may verify, refute, explain, amplify or supplement the record from their own diverse points of view. In our view, a public investigatory hearing is the most effective means to this end. For these reasons, among others, we determined that public proceedings should be the rule herein, and that non-public procedures should be used only in those extraordinary instances where disclosure would irreparably damage private, competitive interests and where such interests could be found by the Presiding Officer to outweigh the paramount interest of the public and the Commission in full public disclosure. It was not the Commission's intention that the non-public procedure be used, solely for their own convenience, by private persons who might be called as witnesses. Nor was it the Commission's intention to accept any information on a basis which would prevent its disclosure if the public interest so requires."

The Conclusions of Law and Order are printed in the margin.*

CONCLUSIONS OF LAW

I

This Court has jurisdiction of the Cause.

Communications Act of 1934, as amended, Sections 401 (a), 401(b), 409(g); 47 U.S.C. §§ 401(a), 401(b), 409(g).

II

The Commission is authorized to conduct the instant investigation.

Communications Act of 1934, as amended, § 403, 47 U.S.C. § 403; *Federal Communications Commission v. Cohn*, 154 F. Supp. 899, 906 (S.D.N.Y. 1957).

III

The Commission has authority to issue the subpoena and orders sought to be enforced in this proceeding.

Communications Act of 1934, as amended, §§ 409 (e), (f), 47 U.S.C. §§ 409 (e), (f);

Stahlman v. Federal Communications Commission, 126 F. 2d 124, 128 (D.C. Cir. 1941);

Federal Communications Commission v. Cohn, 154 F. Supp. 899, 906 (S.D.N.Y. 1957);

See:

Hunt Foods & Industries, Inc. v. Feedral Trade Commission, 286 F. 2d 803, 808–809 (9th Cir., 1960) aff'g the opinion in

Federal Trade Commission v. Hunt Foods & Industries, Inc., 178 F. Supp. 448 (S.D. Cal. 1959);

Federal Trade Commission v. National Biscuit Company, 18 F. Supp. 667, 671 (S.D.N.Y. 1937).

IV

Complementing its investigative power, the Commission is authorized by Sections 4(i), 303(f) and 303(g) of the Communications Act (47 U.S.C. §§ 154(i), 303(f), and 3039(g)),

APPEAL BY COMMISSION

We will first deal with the appeal by the Commission and will state the questions and errors specified

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to perform any and all acts, make such rules and regulations, issue orders not inconsistent with the Communications Act, as may be necessary in the execution of its functions and generally to encourage the larger and more effective use of radio in the public interest. Section 303(i) of the Communications Act (47 U.S.C. § 303(i)) authorizes the Commission to make special regulations applicable to radio stations engaged in chain broadcasting as the public interest, convenience, or necessity require.

V

The Commission is required to report to Congress information and data considered of value in the determination of questions connected with the regulation of broadcasting and to make specific recommendations to Congress as to additional legislation which the Commission deems necessary or desirable (Communications Act, Section 4(k), 47 U.S.C. § 154(k)).

VI

The Commission was authorized by Sections 5(d)(1) and 5(d)(2) of the Communications Act (47 U.S.C. § 155(d)(1)) to designate its Chief Hearing Examiner, Mr. James D. Cunningham, to preside over the taking of evidence in that phase of the investigatory proceeding pertinent to this cause.

VII

Under § 6(a) of the Administrative Procedure Act, respondents were not entitled to cross-examine witnesses testifying in these hearings. Respondents were and are, however, entitled to the following:

(a) The right to have counsel accompany respondents when testifying;

(b) The right to have respondents' counsel object to any questioning by the Commission, its counsel or Hearing Examiner deemed improper by respondents' counsel;

(c) The right to have counsel for respondents present on the record concise grounds and reasons for any such objection;

(d) The rights to have counsel for respondents, without

in the language of the Commission set forth in its opening brief.

Questions Presented

1. Whether the District Court erred in find-

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interference by the Commission, its counsel or Hearing Examiner, initiate advice to his client with respect to the propriety or legality of any question asked of his client and to advise his client not to answer any such questions deemed improper.

VIII

The information requested in "Annex B" of the Commission's subpoena is reasonably relevant to the inquiry being conducted by the Commission.

Mines & Metals Corp v. Securities and Exchange Commission, 200 F. 2d 317, 321 (9th Cir. 1952);

Detweiler Bros. v. Walling, 157 F. 2d 841 (9th Cir. 1946);

United States v. Woerth, 130 F. Supp. 930, 937–939 (N.D. Iowa 1956).

IX

The Federal Communications Commission possesses a broad power of investigation and subpoena, and the fact that the respondents were not licensees of the Commission did not prevent it from seeking the required information from them.

Federal Communications Commission v. Cohn, 154 F. Supp. 899, 906 (S.D.N.Y. 1957);

Stahlman v. Federal Communications Commission, 126 F. 2d 124, 128 (D.C. Cir. 1941).

X

The alleged failure of the Commission to promulgate adequate ground rules to cover the proceeding did not prejudice respondents.

Administrative Procedure Act, Section 10(e) [5 U.S.C. § 1009(e)].

XI

The subpoena and order duly served upon respondents in this

ing and concluding that any further interrogation of appellees and any documents produced

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proceeding are in all respects valid, and respondents are in disobedience of the same.

XII

This Court has the power to retain jurisdiction for any subsequent proceedings consequent upon the Order issued.

Hunt Food & Industries, Inc. v. *Federal Trade Commission*, 286 F. 2d 803, 813 (9th Cir. 1960).

In accordance with the Findings of Fact and Conclusion of Law:

1. It Is Hereby Ordered that respondents, MCA, Inc. and Taft B. Schreiber, are hereby ordered to appear before a Presiding Officer duly appointed by the Federal Communications Commission at a time and place to be fixed by the Commission, to testify and to produce books, papers and documents in accordance with the subpoena issued and served upon the respondents on October 17, 1960, and orders issued by the Commission and duly served upon the respondents.

2. It Is Further Ordered that any further interrogation of respondents and any documents produced by respondents be taken and held by the Commission in private and confidential session, that the public be excluded therefrom, that all testimony adduced and documents produced be maintained in confidence by the Commission, that the Commission by motion duly made and served, may move the Court upon the conclusion of such interrogation and production for an order, should good cause exist therefor, permitting such testimony and documents to be made public, and that respondents shall retain the right to oppose such motion if and when so made.

3. It Is Further Ordered that in the course of any further interrogation of respondents:

"a) Counsel for respondents shall not be entitled to cross-examine witnesses;

"b) Respondents shall have the right to have counsel accompany respondents when testifying, the right to have respondents' counsel object to any questioning by the Commission, its counsel or the Hearing Examiner deemed improper by respondents' counsel, the right to have counsel for respondents

by them shall be taken in a private, non-public proceeding and held by the Commission on a confidential basis; that the Commission must move the District Court for an order allowing the documents and testimony to be made public; and that appellees shall have the right to oppose such a motion.

2. Whether the District Court erred in concluding that under Section 6(a) of the Administrative Procedure Act, 5 U.S.C. 1005(a), appellees have the following rights:

(a) The right to have their counsel object to any questioning by the Commission, its counsel, or the presiding officer deemed improper by appellees' counsel.

(b) The right to have appellees' counsel present, on the record, concise grounds and reasons for any such objection.

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present on the record concise grounds and reasons for any such objection, and the right to have counsel for respondents, without interference by the Commission, its counsel or the Hearing Examiner, initiate advice to his client with respect to the propriety or legality of any question asked of his client and to advise his client not to answer any such question deemed improper.

"c) If respondents decline to answer any questions upon advice of counsel or otherwise, the propriety of all such questions shall be ruled upon by this Court upon appropriate motion by many of the parties hereto, and respondents shall not be deemed to be in contempt either of this Court or of the Commission or suffer or incur any penalty until and unless the Court has ruled in favor of the propriety of any such questions and respondents thereafter refuse or decline to answer the same."

4. It Is Hereby Ordered that the Order of this Court shall be, and it is hereby, stayed during and throughout the period within which an appeal may be taken from such Order, and, if an appeal be taken therefrom, such stay shall remain in effect during and throughout the period of the pendency of the appeal.

5. The Court retains jurisdiction of this cause for any subsequent proceedings consequent upon this order.

Specification of Errors

1. The District Court erred in its Finding of Fact XI.

2. The District Court erred in its Conclusion of Law VII(b) and VII(c).

We will consider these questions and specifications of error in the order set forth above.

First Question and Specification of Error

In his decision (pp. 425–426 of 201 F. Supp.), the Trial Judge stated:

> "However, I am of the opinion that in view of the well-grounded fears of the respondents that the testimony to be given might result in disclosure of trade-secrets, of which competitors might take advantage, it is ordered that the Examiner confine attendance at the hearing to the persons directly involved in the proceedings, their counsel, experts and witnesses, and exclude the general public."
>
> "The respondents, MCA, Inc. and Taft B. Schreiber, are hereby ordered to appear before a Hearing Examiner duly appointed by the Commission at a time and place to be fixed by the Commission, to testify and to produce books, papers and documents in accordance with the above mentioned subpoena and orders issued by the Commission and duly served upon the respondents. Jurisdiction will be retained by the Court for any subsequent proceedings consequent upon the order. (Hunt Food & Industries, Inc. v. Federal Trade Commission, 9th Cir., 1960, 286 F. 2d 803, 813)."

The Trial Court's Finding of Fact No. XI reads:

> "The record herein, including but not limited to, the testimony in the extensive hearings held by the Commission in its network programming inquiry, make it necessary that in

protection of respondents' rights and to preclude disclosure of trade secrets of which competitors might take advantage, all further interrogation of, and all further testimony given by, respondents shall be given in nonpublic sessions, and shall be retained and maintained in confidence by the Commission."

The Commission does not question that the Trial Court had the authority to impose safeguards to prevent the possible disclosure of trade secrets, while ordering that appellees appear, testify and disclose the material sought by the Commission, but contends that the District Court abused its discretion and therefore erred.

In *Chapman* v. *Maren Elwood College,* 9th Cir., 1955, 225 F. 2d 230, at Page 231, we stated:

> "The key question in enforcement of the demand to produce records is whether it is reasonable or arbitrary * * * The question of reasonableness is one for consideration and adjudication by the courts. The mere fact that a demand has been made by an administrative agency does not establish the demand as reasonable."

In *Goldberg v. Truck Drivers Local Union No. 299,* 6th Cir., 1961, 293 F. 2d 807, at Page 814, the Court states:

> "In our opinion, it was not unreasonable to compel production of records which the law required to be kept and from which the reports filed with the Secretary were made * * * The District Court, however, had the power to impose protective restraints on the conduct of the investigation to relieve against oppression or other illegal conduct. Hunt Foods & Industries, Inc. v. Federal Trade Commission, 9th Cir., 286 F. 2d 803, 811, certiorari denied 365 U.S. 877, 81 S. Ct. 1027, 6 L. Ed. 2d 190."

In *FCC v. Cohn*, S.D.N.Y. 1957, 154 F. Supp. 899, at Page 908, the Court held:

> "Of course the subpoena power must at all times be confined to 'the rudimentary principles of justice', and the courts will plainly refuse to enforce an administrative subpoena which is not within the bounds of reasonableness. Hale v. Henkel, 201 U.S. 43, 26 S. Ct. 370, 50 L. Ed. 652; Chapman v. Maren Elwood College, 9th Cir., 225 F. 2d 230; NLRB v. Anchor Rome Mills, 5th Cir., 197 F. 2d 447, 449–450. There is a delicate balance between the necessity of obtaining information required in the public interest in furtherance of a lawful inquiry, and the onerous burdens which the furnishing of this information may place on these respondents. But in the case at bar the scales are tipped on the side of the public interest so as to outweigh the burden and inconvenience to the respondents."

and at Page 911,

> "Subpoenas of an administrative agency, though validly issued, need not be enforced precisely according to their terms or without modification. Whenver it is made to appear that a subpoena is so broadly drawn as to be oppressive and unreasonable it is the duty of the court to prevent abuse of its process and to place such limitations upon the subpoena as is just and right under all the circumstances. NLRB v. Anchor Rome Mills, 5th Cir., supra, 197, F. 2d, at Page 449; see Kilgore National Bank v. Federal Petroleum Board, 5th Cir., 209 F. 2d 557, 560; cf. Chapman v. Maren Elwood College, 9th Cir., 225 F. 2d 230, supra; Walling v. American Rolbal Corp., 2nd Cir., 135 F. 2d at Page 1005, supra. These matters are in the court's discretion."

In *Delno v. Market St. Ry. Co.*, 9th Cir., 1942, 124 F. 2d 965, at Page 967, this Court said:

> "Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court then it cannot be said that the trial court abused its discretion."

In a recent case, *Weller v. Dickson*, 9th Cir., 1963, 314 F. 2d 598, beginning on Page 600, we said, in part:

> "* * * we must consider for a moment what is meant by the exercise and abuse of discretion. The judicial efforts to give these expressions some legal stability are legion. It was held in Hartford-Empire Co. v. Obear-Nester Co., 95 F. 2d 414, 417 (8th Cir., 1938) that where an appellate court has power to review the exercise of a judicial discretion governed by situation and circumstances affecting exercise of discretion, inquiry is confined to the question whether the situation and circumstances clearly show an 'abuse of discretion', that is, arbitrary action not justified in view of the situation and circumstances.
>
> "The court in NLRB v. Gurnsey-Muskingum Elect. Co-op., 285 F. 2d 8, 11 (6th Cir., 1960) pointed out that there is no exact measure of what constitutes an abuse of discretion, and it is more than the substitution of judgment of one tribunal for that of another, discretion being governed by situation and circumstances affecting each individual case, and even where an appellate court has power to review exercise of such discretion, inquiry is confined to whether such situation and circumstances clearly show an abuse of discretion, that is, arbitrary action

not justifiable in view of such situation and circumstances.

"Present day decisions have tended to erode the common law meaning of many words and phrases used in legal literature and as a result the word 'discretion' as it is now generally used in the law, is but an anemic facsimile of a robust ancestor. Unless we are about to attend its demise, and make the word entirely meaningless, we should proceed with some caution."

In *Wigmore on Evidence,* McNaughton Revision, Volume VIII, Section 2212, under the title "Trade Secrets and Customers' Names", we note the following language:

"Accordingly, there ought to be and there is, in some degree, a recognition of the privilege not to disclose that class of facts which, for lack of a better term, have come to be known as trade secrets.

"Nevertheless, the occasional necessity of recognizing it should not blind us to the danger of such a measure, or entice us into an unqualified sanction for such a demand * * *. In other words, a person claiming that he needs to keep these things secret at all should be expected to make the exigency particularly plain * * *. No privilege at all should there be conceded, although as much privacy as possible might be preserved by compelling disclosure no farther than to the judge himself, * * *."

We hold, therefore, that the Trial Judge did not abuse his discretion, but, on the contrary, established a fair and just procedure whereby a most important investigation could proceed without being unduly disrupted, obstructed or prolonged, and at the same time afford appellees protection against the improvident disclosure of possible valuable trade secrets.

Second Question and Specification of Error

Did the District Court err in its Conclusion of Law No. VII (b) and (c), which reads,

> "Under §6(a) of the Administrative Procedure Act, respondents were not entitled to cross-examine witnesses testifying in these hearings. Respondents were and are, however, entitled to the following:
>
> "(b) The right to have respondents' counsel object to any questioning by the Commission, its counsel or Hearing Examiner deemed improper by respondents' counsel.
>
> "(c) The right to have counsel for respondents present on the record concise grounds and reasons for any such objections."

The parties agree and we so hold that the proceedings in this case are investigatory and not adjudicative in nature. They also agree that the right of counsel to object and argue objections on the record, if it exists in this case, is not a constitutional right, but a statutory right. We concur; see *Hannah* v. *Larche,* 363 U.S. 420, 4 L. Ed. 2d 1307, 80 S. Ct. 1502 (1960).

Does the first sentence of Section 6(a) of the Administrative Procedure Act (5 U.S.C. § 1005(a)) apply to fact-finding investigations by the Commission, or is the sentence applicable only to the Commission's adjudicative functions?

Professor Davis in his work, Administrative Law Treatise, Volume I, Section 8.10, Right to Counsel, writes:

> "The Administrative Procedure Act provides in § 6(a): 'Except as otherwise provided in this Act— * * * Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented and advised by counsel or,

if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding.'

"The first sentence reverses the law declared in Bowles v. Baer, 142 F. 2d 787, (7th Cir. 1944), holding that witnesses subpoenaed in an administrative investigation may be denied representation by counsel. If the person is 'compelled to appear in person', he is entitled to counsel."

The first sentence of Section 6(a) has been held to assure the appearance of counsel with taxpayers and with other witnesses compelled to appear for examination before agents of the Internal Revenue Service conducting private investigations. *Backer* v. *Commissioner of Internal Revenue,* 5th Cir., 1960, 275 F. 2d 141; *In Re Neil,* D.C.S.D. W. Va., 1962, 209 F. Supp. 76; *United States* v. *Smith et al.,* D.C. Conn., 1949, 87 F. Supp. 293. The statutory authority for the appearance of counsel in these cases is the Administrative Procedure Act. In the Internal Revenue Code, Congress did not provide for the appearance of counsel in such cases.

The Trial Judge, in his opinion in this case, at Page 423 of 201 F. Supp., pointed out that in *Hannah,* the Supreme Court considered the meaning of the right to counsel before regulatory agencies conducting fact-finding investigations. While this is true, in our reading of *Hannah,* the Civil Rights Act and not the Administrative Procedure Act is the source of authority for appearance of counsel.

The Supreme Court did not hold that the first sentence of Section 6(a) applies to investigations by regulatory agencies. As a matter of fact, the Commission argues that in *Hannah,* the Court, by impli-

cation, took the contrary position. Beginning at Page 445 of 363 U.S., we find this language:

> "Although these agencies normally make determinations of a quasi-judicial nature, they also frequently conduct purely fact-finding investigations. When doing the former, they are governed by the Administrative Procedure Act, 60 Stat. 237, 5 USC §§ 1001–1011, and the parties to the adjudication are accorded the traditional safeguards of a trial. However, when these agencies are conducting nonadjudicative, fact-finding investigations, rights such as apprisal, confrontation, and cross-examination generally do not obtain."

What the Supreme Court actually decided in *Hannah* was that the Due Process Clause of the Fifth Amendment did not require that, in fact-finding, nonadjudicative investigations, "the full panoply of judicial procedures be used * * * due process embodies the differing rules of fair play, which through the years have become associated with differing types of proceedings * * *" (p. 442 of 363 U.S.). Thus, in stating that when an agency acts quasi-judicially, it is governed by the Administrative Procedure Act and the parties are accorded the "traditional safeguards of a trial", the Court is indicating that the Administrative Procedure Act assures due process under the Fifth Amendment where there is a trial-type, adjudicative proceeding.

Unlike the Civil Rights Act considered in *Hannah*, the Federal Communications Act does not provide for the appearance of counsel when the Commission conducts a fact-finding, nonadjudicative investigation. Therefore, unless the first sentence of Section 6(a) applies, counsel's right to appear and participate in the instant hearing exists only by virtue of the Commission's duly promulgated Rules and Regulations.

Since the Supreme Court has not decided the question of the applicability of the first sentence of Section 6(a) of the Administrative Procedure Act to nonadjudicative, fact-finding investigations, neither should we, unless it is necessary. We need not and do not do so, because, assuming that the first sentence of Section 6(a) applies to the instant investigation, we hold that its requirements have been met.[5]

Appellees contend that the word "represented" in the phrase "the right to be accompanied, represented, and advised by counsel" in the first sentence of Section 6(a) entitled counsel to object and to state grounds in support of objections on the record and the Trial Judge apparently agreed.

This is a question of first impression. We hold that the word "represented" must be read in light of the Due Process Clause of the Fifth Amendment and therefore varies in meaning depending upon the nature of the function being exercised. While counsel may, as a matter of right, object and argue objections on the record, just as he may, as a matter of right, cross-examine and call witnesses in a trial-type, adjudicatory proceeding, these rights do not exist in the

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[5] From the record, it is clear that Schreiber was permitted by the Commission to be accompanied and advised by counsel While the record does show that the Examiner did on one occasion deny counsel the right to initiate advice to the subpoenaed witness, the Commission has not appealed from subparagraph (d) of paragraph VII of the Trial Court's Conclusion of Law (Note 4 supra) that under Section 6(a), appellees were entitled to:

"(d) The right to have counsel for respondents, without interference by the Commission, its counsel or Hearing Examiner, initiate advice to his client with respect to the propriety or legality of any question asked of his client and to advise his client not to answer any such questions deemed improper."

fact-finding, nonadjudicative investigation unless specifically provided by statute or duly promulgated rules. The right to object and argue objections on the record is not to be implied, here, from the use of the word "represented" in Section 6(a).

The Commission's proposed Conclusion of Law No. VII reads as follows:

"VII

"The respondents were accorded the representation by counsel to which they were entitled by law in an investigatory proceeding such as that before the Commission.

"*Hannah v. Larche,* 363 US 420, 446 (1960)

"*Administrative Procedure Act,* § 6(a) (5 USC § 1005(a))".

The Trial Court rejected the Commission's proposed Paragraph VII in favor of Paragraph VII proposed by appellees. For the reasons given, the Trial Court erred in so doing. Under the Federal Communications Act, the Commission has the authority to limit counsel in this regard. Inherent in the Commission's power of investigation (47 U.S.C. § 403) is the authority "to prevent the sterilization of investigations by burdening them with trial-like procedure." (*Hannah v. Larche,* Page 448 of 363 U.S.).

The reasoning in *Hannah* supports our position. There, the Court quotes with approval a rule of the Federal Trade Commission that while "persons summoned to appear before investigative proceedings * * * may have the advice of counsel, 'counsel may not, as a matter of right, otherwise participate in the investigation.'" (p. 446 of 363 U.S.).

Cross Appeal by Appellees

Appellees contend that the District Court erred by failing to conclude that the Commission is without power to compel appellees to produce documents requested and to give testimony until the Commission complies with the requirements of Section 3 of the Administrative Procedure Act by promulgating and publishing proper rules governing the procedures for investigative proceedings.

The language of Section 3(a) of the Administrative Procedure Act relied upon by appellees is found in 5 U.S.C. § 1002, and in its pertinent parts, reads,

> "(a) Every agency shall separately state and currently publish in the Federal Register * * * substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published."

Appellees contend, generally, that the Commission is required to promulgate and publish rules and regulations governing investigations similar to the Commission's rules of practice applicable to its adjudicative proceedings (47 C.F.R. §§ 1.11–1.56) and specifically that there must be promulgated and published procedures governing the role of counsel, witnesses and review by the Commission of determinations made by the Examiner.

The Commission cites Section 1.10 of its Rules and Regulations (47 C.F.R. § 1.10), as follows:

> "*Proceedings before the Commission.* The Commission may on its own motion or petition of any interested party hold such proceedings

> as it may deem necessary from time to time in connection with the investigation of any matter which it has power to investigate under the law, or for the purpose of obtaining information necessary or helpful in the determination of its policies, the carrying out of its duties or the formulation or amendment of its rules and regulations. For such purposes it may subpena witnesses and require the production of evidence. Procedures to be followed by the Commission shall, unless specifically prescribed in this part, be such as in the opinion of the Commission will best serve the purpose of such proceeding."

The Commission calls to our attention that it has published in the Federal Register some thirteen orders governing this proceeding.*

We find that the record supports the Commission's position that appellees have had full and complete notice of all proceedings taken which concern them and that appellees have not been prejudiced in any manner by the Commission's failure to promulgate and publish rules and regulations if required. Appellees apparently concede that this is so, but argue that they may be prejudiced in the future since the Commission's investigation has not been completed.

The Trial Judge found these objections without merit. At Page 425 of 201 F. Supp., he said:

> "The complaint that the Commission has not promulgated 'ground rules' as required by the Administrative Procedure Act (5 U.S.C.A.

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* References to the Federal Register are footnoted, Note 4, Page 425, of 201 F. Supp., as follows:

"See, § 1.10 of the Commission's Rules and Regulations, 47 C.F.R., § 1.10 and thirteen special orders issued in the present proceeding, and published. See, 24 F.R. 1605, 2918, 3060, 5122, 5726, 9275, 9377; 25 F.R. 2116, 6998, 7552; 26 F.R. 992, 1194, 4462."

§§ 1002, 1003) is not well taken. It is doubtful if the provisions of that Act apply to any but adjudicating agencies. (Hannah v. Larche, supra, 363 U.S. pp. 452–543, 80 S. Ct. 1502, 4 L. Ed. 2d 1307). Furthermore, there is evidence in the record showing that rules have been promulgated which are suited to the needs of the Commission. At any rate, unless and until an adjudicative stage is reached, the failure to make rules becomes an abstract question which need not be decided now. Failure to do so does not prejudice the respondents."

We also note Paragraph X of the Conclusions of Law reads:

"X

"The alleged failure of the Commission to promulgate adequate ground rules to cover the proceeding did not prejudice respondents.

"Administrative Procedure Act, Section 10(e), [5 U.S.C. § 1009(e)]."

It is not necessary for us to decide whether Section 3(a) applies to nonadjudicative, fact-finding investigations, and it is unnecesary to define the term "substantive rule" as used in Section 3(a) or to determine if the rules appellees seek constitute rules of substance or procedure,[7] since failure to promulgate and publish rules has not prejudiced appellees.

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[7] *Ranger* v. *FCC*, 1961, 294 F. 2d 240, 244, reads, in part:

"But the Administrative Procedure Act excepts from formal rule making requirements amendments which effect only procedural changes. The Commission insists that the amendment here involved was a procedural change, and we agree. Of course all procedural requirements may and do occasionally affect substantive rights, but this possibility does not make a procedural regulation a substantive one."

See *Hotch* v. *U.S.*, 9th Cir., 1954, 212 F. 2d 256, where this Court struck down a criminal conviction for failure to properly promulgate and publish a substantive rule required by Section 3(a) of the Administrative Procedure Act.

While Section 10(e) of the Administrative Procedure Act directs the reviewing court to set aside agency action found to be taken without observance of procedure required by law, it also directs that the Court take due account of the rule of prejudicial error. See *Madokoro v. Del Guercio*, 9th Cir., 1947, 160 F. 2d 164, 167, cert. denied 332 U.S. 764; *Alesi v. Cornell*, 9th Cir., 1957, 250 F. 2d 877, 879; *Florida Citrus Commission v. United States*, D.C.N.D. Fla., 1956, 144 F. Supp. 517, 521; aff'd. 362 U.S. 1201.

We refuse to speculate about the future. In the event other conflicts arise during the investigation, judicial review is available. We find the cross appeal without merit.

We affirm the Trial Court, except that Subparagraphs (b) and (c) of Paragraph VII of the Conclusions of Law are stricken and the order below is modified to conform to this opinion.

BROWNING, *C.J.*, dissenting in part:

I

Under federal regulation primary responsibility for program content is imposed upon individual television broadcast licensees.[1] The purpose of the present investigation is to determine whether control of pro-

[1] As the Commission stated in its order of Nov. 10, 1959, 24 Fed. Reg. 9275:

"* * * under the Communications Act and the policies promulgated by the Commission thereunder, the selection, supervision and broadcast to the public of programs and other material including advertising is the primary responsibility of the licensed broadcaster subject to the duty of such broadcaster so to exercise that responsibility as to serve the public interest in terms of the needs and interests of the community which such broadcaster is licensed to serve * * *."

gram content has in fact passed into the hands of others, and, if so, what administrative action should be taken, or legislative action recommended, in response to the shift in power.[2] The authority of the Commission to conduct such an inquiry is not questioned.[3] The public interest in its thoroughness and effectiveness is obviously great.

Mr. Schreiber is Vice President of MCA, Inc. The Commission has found, without challenge, that MCA "engages on a large scale, in all facets of television program production," and that "failure fully to explore the policies, practices and activities of MCA, Inc. * * * would serious impair, if not render nugatory," the Commission's inquiry.

Schreiber and MCA do not question the validity of the Commission's subpoenas and orders requiring the testimony of Schreiber and the production of the records of MCA described in Annex B.[4] They contend only that the Commission erred in declining to receive the testimony and documents in confidence.

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[2] The purpose and scope of the inquiry are detailed in the Commission's orders of Feb. 26, 1959, 24 Fed. Reg. 1605, and Nov. 10, 1959, 24 Fed. Reg. 9275.

[3] Congress granted the Commission "full authority and power at any time to institute an inquiry * * * as to any matter * * * concerning which any question may arise under any of the provisions" of the Communications Act of 1934. 47 U.S.C.A. § 403.

[4] The District Court held that "the Commission has authority to issue the subpoena and orders sought to be enforced in this proceeding"; that "the information requested in 'Annex B' of the Commission's subpoena is reasonably relevant to the inquiry being conducted by the Commission"; and that "the subpoena and order duly served upon respondents in this proceeding are in all respects valid, and respondents are in disobedience of the same." Schreiber and MCA have not challenged these findings and conclusions on their cross-appeal.

The order initiating the inquiry directed that the proceedings be public, except where the public interest, the proper dispatch of business, and the ends of justice would be served by nonpublic sessions. The exception, as the Commission later made clear, was intended to permit the presiding officer to order nondisclosure of particular evidence "where disclosure would irreparably damage private, competitive interests and where such interests could be found * * * to outweigh the paramount interest of the public and the Commission in full public disclosure."[5]

The adoption of this rule of procedure was well within the Commission's power. Section 4(j) of the Communications Act of 1934 (47 U.S.C.A. § 154(j)) provides that the Commission "may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." Congress by this grant of authority to the Commission "left largely to its judgment the determination of the manner of conducting its business * * * ." *FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 282 (1949).[6]

Grants of agency authority comparable in scope have been held sufficient to authorize public production of information,[7] or receipt of data in confi-

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[5] See note 3 of this court's opinion.

[6] The Commission's own statement of its authority in this regard is similarly broad. Section 1.10 of the Commission's General Rules of Practice and Procedure provides that procedures to be followed in investigative proceedings shall "be such as in the opinion of the Commission will best serve the purposes of such proceeding." 47 C.F.R. § 1.10 (1958).

[7] See, e.g., Isbrandtsen-Moller Co. v. United States, 300 U.S. 139 (1937); E. Griffith Hughes Inc. v. FTC, 63 F. 2d 362 (D.C. Cir. 1933).

It is "the fundamental policy of free societies that justice is usually promoted by disclosure rather than secrecy." Boeing

dence,[8] in investigative inquiries, as the agency may determine to be proper on a balancing of public interest and private rights in the particular instance. The choice cannot be arbitrary or an abuse of the agency's discretion, and judicial relief is available if it is.[9]

Airplane Co. v. Coggeshall, 280 F. 2d 654, 662 (D.C. Cir. 1960). "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Brandeis, Other People's Money (1914), quoted in In re Util. Employees Sec. Co., 3 S.E.C. 1087, 1094 (1938). See also In re H. P. Hood & Sons, Inc., No. 7709, FTC, March 14, 1961, 11 Pike & Fischer, Admin. Law (2d) 116 (1962); Trade Reg. Rep. ¶ 29461 (FTC 1961), Comment 60 Mich. L. Rev. 647 (1961–1962).

Public exposure may also, however, be an instrument of abuse. See generally Rourke, Law Enforcement through Publicity, 24 U. Chi. L. Rev. 225 (1956–1957); Newman, Due Process, Investigations and Civil Rights, 8 U.C.L.A. L. Rev. 735, 755–58 (1961); Gellhorn & Byse, Administrative Law 666–75 (4th ed. 1960); Note, 72 Yale L.J. 1227 (1963).

[8] See Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 321–22 (1933); Bowles v. Baer, 142 F. 2d 787, 789 (7th Cir. 1944); Woolley v. United States, 97 F. 2d 258, 262 (9th Cir. 1938). "Agencies themselves, of course, may make investigative proceedings private, excluding the public." Davis, Administrative Law 229 (1958). Section 6(b) of the Administrative Procedure Act (APA) contemplates "a nonpublic investigatory proceeding." 5 U.S.C.A. § 1005(b). See Newman, Federal Agency Investigations: Procedural Rights of the Subpoenaed Witness, 69 Mich. L. Rev. 169, 172 (1961–1962).

[9] See, e.g., Bank of America Nat'l Trust & Sav. Ass'n v. Douglas, 105 F. 2d 100, 102 (D.C. Cir. 1939); FCC v. Cohn, 154 F. Supp. 899, 912–13 (S.D.N.Y. 1957); FTC v. Bowman, 149 F. Supp. 624, 630 (N.D. Ill. 1957), aff'd 248 F. 2d 456 (7th Cir. 1957); 1 Davis, Administrative Law 229 (1958). See also Menzies v. FTC, 242 F. 2d 81, 84 (4th Cir. 1957).

But the decision in the first instance belongs to the administrative authority, and its decision is not to be disturbed unless these limits are transgressed.[10]

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[10] The following comments regarding agency discretion to choose between public and private disclosure were made in the light of statutory provisions which granted the agencies concerned no greater power over the conduct of hearings than is vested in the Commission by 47 U.S.C.A. § 154(j):

American Sumatra Tobacco Corp. v. SEC, 93 F. 2d 236, 239 (D.C. Cir. 1937), 110 F. 2d 117, 120–21 (D.C. Cir. 1940):

"For unquestionably Congress * * * imposed on the Commission the duty of considering the claimed danger of loss and damage and of weighing it in the scale of public interest. And this, at least, is what the Commission has attempted to do and, if the conclusion reached is just as likely to be correct as incorrect, it is our duty to let it stand.

"* * * [T]he question is primarily not for us but for the Commission, and Congress unquestionably intended that the Commission should bring to bear upon the decision of this and like questions, what has been called in cases within the jurisdiction of the Interstate Commerce Commission, the knowledge and experience of experts. This does not by any means set up an inquisition destructive of the rights of the individual. The delegated power is not to be exercised arbitrarily or to be considered an unfettered discretion over the property of the citizen. Its exercise is subject to review. But so long as the Commission's decision rests on substantial evidence and on inferences which are not arbitrary and capricious, it should be sustained. * * *

E. Griffith Hughes, Inc. v. FTC, 63 F. 2d 362, 363 (D.C. Cir. 1933): "Doubtless Congress considered that there might be occasions when it would be unjust to a person or corporation proceeded against to require public hearings and left the decision in such cases to the board." And at 364: "Doubtless on such a hearing as is here provided the Commission has discretion, on a showing that such a hearing would disclose trade secrets or other data in itself destructive of the business under investigation, to do whatever is proper and necessary to avoid these consequences * * *."

SEC v. Harrison, 80 F. Supp. 226, 229 (D.D.C. 1948):

The reasons for the Commission's decision to require public disclosure in the present inquiry appear fully in the record.[11] The inquiry is purely investigative; its sole purpose is to secure information to aid the Commission in the discharge of its functions; it "is not intended to and cannot adjudicate the rights of any person."[12] The subject matter of the inquiry is

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"* * * it must rest in the sound discretion of the agency created by the Congress, and not with the courts, to determine when investigations are to be conducted by open or closed hearings."

See also Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 321–22 (1933).

The same rule should apply whether the question is raised in a proceeding brought by the agency to compel testimony or production of documents, or in a suit brought by a proposed witness or custodian of documents to restrain the inquiry. The standard applied in the former [that is, whether the administrative officer has acted "arbitrarily or in excess of his statutory authority," Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 216 (1946), or whether the inquiry is authorized by law, the materials relevant, and the disclosure reasonable, Cooper, Federal Agency Investigations: Requirements for the Production of Documents, 60 Mich. L. Rev. 187 (1961–1962)] is in substance the same as that applied in the latter [that is, whether the process is "authorized by law," APA § 6(b), 5 U.S.C.A. § 1005(b), the evidence sought is of "general relevance and reasonable scope," APA § 6(c), 5 U.S.C.A. § 1005(c), or whether the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." APA § 10(e), 15 U.S.C.A. § 1009(e)].

[11] See note 3 of this court's opinion.

[12] For a development of the argument that the need for nonpublic hearings is greater where investigatory hearings are preliminary to enforcement proceedings, rather than, as here, for the purpose of gathering information for rule-making or legislation, see Note, The Distinction between Informing and Prosecutorial Investigations: A Functional Justification for "Star Chamber" Proceedings, 72 Yale L.J. 1227 (1963).

"complex and generally unknown," and involves "many-sided transactions" among "networks, advertising agencies, program producers, program packagers, talent agencies" and others. Therefore, in order "to obtain a full and rounded picture of such transactions, it is highly desirable" that the information supplied by each group or individual be disclosed so that the others "may verify, refute, explain, amplify or supplement the record from their own diverse points of view." Moreover, through public hearings the industry may be made aware of the factual basis supporting any action ultimately taken, a practical inducement to industry acceptance of the inquiry's results.[13] These factors, it may be noted, are largely of a kind falling within the special competency of the administrative agency to perceive and to evaluate.

Having determined that the public interest required public disclosure, the Commission properly placed the burden of justification upon those who asked that the evidence sought from them be received in confidence.[14]

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[13] "In such investigations a primary function of the process is to reach an external audience which includes the Congress, those segments of the public which are primarily affected by the agency's regulatory policies, and the body politic itself. While the use of public hearings is not strictly necessary for the dissemination of the information produced, the publicity generated by the gathering of raw rata may contribute substantially to the effectiveness of the informing process." Note, 72 Yale L.J. 1227, 1236 (1963).

[14] See, e.g., Graber Mfg. Co. v. Dixon, C.A. No. 2869–62, D.D.C., Nov. 6, 1963: "Of course, the public interest in open hearings places the burden upon the plaintiffs to show that their documents should be received in confidence." Section 3(c) of APA, 5 U.S.C.A. § 1002(c) provides: "Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential *for good cause found*." [Emphasis added.] Cf. authorities cited note 24 infra.

It cannot be said with reason that the Commission acted arbitrarily or in abuse of discretion in determining that Schreiber and MCA failed to discharge their burden of justifying nondisclosure.

A. *As to Annex B*

Schreiber testified that the information sought by Annex B would disclose MCA's agency relationship with clients, and that under a contract between the Screen Actors Guild and Artists & Managers Guild such relationships were not to be disclosed without the clients' consent. He further stated that the disclosure "would be possibly advantageous to our competitors." No more was shown.

Obviously, a private agreement not to disclose facts without consent could not affect the Commission in the discharge of its public duties.[15] And there was no actual showing, but only the naked assertion, that the disclosure sought by Annex B would injure either MCA or its clients.

Annex B called only for the production of a list of programs as to which MCA served as "packager" or had a financial interest,[16] and MCA's competitors had furnished the same information without objection.[17]

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[15] Wigmore, Evidence § 2286 (McNaughton rev. 1961).

[16] Customer lists are not entitled to protection per se, but only when the circumstances establish that disclosure would result in competitive injury. See, e.g., Ellis, Trade Secrets § 72 (1953); Barton, A Study in the Law of Trade Secrets, 13 U. Cinc. L. Rev. 507, 526–29 (1939); In re H. P. Hood & Sons, Inc., No. 7709, FTC, March 15, 1961; 11 Pike & Fischer, Admin. Law (2d) 116 (1962). See also Schenley Industries v. Institutional Prods. Corp., 16 F.R.D. 13, 15 (S.D.N.Y. 1954).

[17] Schreiber also provided, without objection, a list of programs as to which MCA had acted as producer rather than as packagers, called for by Annex A.

The presiding officer had in the past protected from disclosure detailed information regarding financial matters and contractual arrangements which might in fact harm private interests without sufficient compensatory benefit to the public, and had offered to take the same action if information produced by MCA justified such treatment. He declined only, on the record made, to receive the information under a binding condition preventing disclosure, imposed in advance of production.

On this record, affirmance by the Commission of the presiding officer's action as to the material sought by Annex B was clearly proper.

B. *Blanket Nondisclosure*

On remand to the presiding officer a broader contention developed. Schreiber and MCA then argued that *all* testimony and documentary evidence to be elicited from them should be received in nonpublic sessions, and disclosed only if a court, in subsequent litigation, should order its release.

There was no factual showing before the presiding officer in support of this sweeping request for nondisclosure; only an argument.

Schreiber and MCA contended that in view of the announced scope of the inquiry the Commission's order to produce "all * * * relevant" material might require MCA "to set forth in a public record every facet of its business" relating to television programming, and that such a disclosure, if demanded, would necessarily include confidential business secrets and expose them to MCA's competitors.

The presiding officer did not know what information would actually be sought; and he could not strike a balance between the public benefit which would result from public disclosure of unidentified information and the injury which MCA would suffer by the

revelation of the unspecified data to its competitors. If and when information was requested which if disclosed might in fact injure MCA's competitive interests, there would be ample opportunity to request that it be received in confidence, and to seek judicial protection if the request were denied. Blanket nondisclosure would have been appropriate only on the assumption that no testimony could be elicited from Schreiber and no documents could be obtained from MCA which could be publicly disclosed. There was no warrant for such an assumption.

The presiding officer[18] acted well within his discretion in refusing to order blanket nondisclosure upon such a record.

In the District Court, as in this court, Schreiber and MCA conceded that no one knew what information Schreiber and MCA might be asked to produce. However, they asserted that an order requiring *in camera* hearings was nonetheless reasonable because the District Court could properly "assume" from questions asked of prior witnesses, and financial and corporate data from public sources which had been introduced in the record, that the Commission intended "to probe deeply into the business affairs of MCA," and therefore that the District Court could properly find, as it did, "that the testimony to be given might result in disclosure of trade-secrets, of

[18] On review of the presiding officer's first order, the Commission, although dealing with the merits of that order, held "that orders and directions of the Presiding Officer as to relevance and public disclosure of evidence, information and data are interlocutory in nature, do not of themselves 'aggrieve' any person, and are not, as of right, appealable to the Commission." This holding precluded an application to the Commission for review of the presiding officer's second order.

which competitors might take advantage." 201 F. Supp. at 425.

Obviously this "showing" added nothing of substance to that made before the presiding officer. It remained wholly speculative whether the Commission would in fact seek to elicit data which if disclosed to competitors would injure MCA, and whether, if such data were sought, the presiding officer would require disclosure even though a balancing of public and private rights justified nondisclosure. At best, the order was premature, and possibly wholly unnecessary. Moreover, it permitted Schreiber and MCA to avoid submitting to the presiding officer the issue of whether particular evidence should be received *in camera*, although "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938). Further, although an administrative agency, no less than a court, is entitled to a presumption that it will act properly and according to law,[19] the order necessarily assumed that if the issue were presented to the presiding officer he would decide it improperly.

It is no answer to say that the District Court did not finally decide that the evidence must be kept confidential, but only deferred that determination until the taking of the evidence was completed and the record again submitted to judicial review.

As the Commission points out, there was a determination that there would be no disclosure in the interim, and that the benefits of public hearings should be lost at least during this period without any

[19] In re Groban, 352 U.S. 330, 336 (1957) (Frankfurter, J., concurring).

showing that secrecy was in fact justified. During this period the Commission could not make the evidence available to Congress [20] and others outside the agency having a continuing, legitimate interest in the problems involved; and the Commission would be denied the benefit of evidence from others in the industry, stimulated by the testimony of these witnesses, and serving to verify, amplify or contradict it. And the period of concealment would inevitably be long—Schreiber and MCA appeared before the presiding officer in response to subpoena on October 21, 1960, and the issues then raised are not yet resolved.

Moreover, the court's order requires the Commission ultimately to establish the specific need for publication,[21] thus shifting the burden of justification away from the person seeking concealment, where it properly rests.[22]

Analogies [23] drawn from authorities under Rules

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[20] The Commission is required to report annually to Congress "such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of * * * radio communication * * *" 47 U.S.C.A. § 154(k)(1).

[21] The court's order provided, "the Commission * * * may move the court upon the conclusion of such interrogation and production for an order, should good cause exist therefor, permitting such testimony and documents to be made public * * *."

[22] See note 14 supra.

[23] Rule 81(a)(3) provides that the Federal Rules of Civil Procedure apply "to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States * * *." It was held in Boeing Airplane Co. v. Coggeshall, 280 F. 2d 654 (D.C. Cir. 1960), that because of this provision of Rule 81(a)(3) the limitations found in Rules 39(b) and 45 (b) and (d) are directly applicable to administrative subpoenas. This result, however, fails "to observe the important distinction between

30(b) and 45 (b) and (d) of the Federal Rules of Civil Procedure demonstrate the soundness of the presiding officer's decision, and the error in the District Court's contrary ruling.

Under these authorities, a person seeking a protective order in discovery proceedings has the burden of justifying it; and a general assertion that business secrets may be disclosed is not enough.[24] Ordinarily, the questioning of witnesses and production of documents will not be limited in advance on the ground that disclosure of privileged material may be sought. The court will not speculate as to what data may actually be requested. The privilege must be asserted when specific demands are made.[25] And discovery

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the administrative proceeding * * * and the court action to enforce the summons * * * Rule 81(a)(3) makes the Rules of Civil Procedure applicable * * * to the court action to enforce the summons * * *. To contend that the proceeding itself before the Commissioner * * * is also a civil case subject to the Rules of Civil Procedure * * * would be going too far." Falsone v. United States, 205 F. 2d 734, 742 (5th Cir. 1953). See also 7 Moore's Federal Practice § 81.06[1] (2d ed. 1955); 5 Moore's Federal Practice § 45.01 [2] (2d ed. 1951); 2B Barron & Holtzoff, Federal Practice & Procedure 281–82 (Rules ed. 1961). It therefore appears that decisions under Rules 30(b) and 45 (b) and (d) are applicable to protective orders with respect to administrative subpoenas only by way of analogy. This would be true whether the protective order is sought from the agency or the court.

[24] See, e.g., Sacks v. Frank H. Lee Co., 18 F.R.D. 500 (S.D. N.Y. 1955); Technical Tape Corp. v. Minnesota Mining & Mfg. Co., 18 F.R.D. 318, 322 (S.D.N.Y. 1955); 4 Moore's Federal Practice 2024, 2034 n. 1a (2d ed. 1963); 2A Barron & Holtzoff, Federal Practice & Procedure 235–36 (Rules ed. 1961). See also 8 Wigmore, Evidence § 2212 (McNaughton rev. 1961).

[25] See, e.g., Alexander's Dep't Stores Inc. v. E. J. Korvette, Inc., 198 F. Supp. 28, 29 (S.D.N.Y. 1961); Brockway Glass Co. v. Hardford-Empire Co., 36 F. Supp. 470, 472 (W.D.N.Y.

should not be interrupted while application is made for a protective order as to each demand; it should be completed, and all questions of privilege submitted to the court in a single application which can then be evaluated in light of the full record.[26]

As a whole, these rules suggest the wisdom of restraint in the issuance of anticipatory protective orders to avoid premature and probably needless interference with the process of discovery. This underlying premise applies with special force to the present case for here the District Court was not dealing with an application for a protective order by a party subjected to unsupervised discovery, but rather with review of a determination made by a neutral presiding officer in a specialized administrative proceeding. Application for orders protecting trade secrets under Rules 30(b) and 45 (b) and (d) are directed largely to the discretion of the trial judge,[27] but it was the presiding officer (by analogy) who stood in this position, not the District Court.

The discretion vested in the presiding officer was not abused by the denial, on this record, of the demand for blanket nondisclosure.

1941); Nekrasoff v. United States Rubber Co., 27 F. Supp. 953, 956 (S.D.N.Y. 1939); Independent Prods. Corp. v. Loew's, Inc., 22 F.R.D. 266, 279 (S.D.N.Y. 1958), and 28 F.R.D. 19, 21 (S.D.N.Y. 1961); Shiner v. American Stock Exch., 28 F.R.D. 34 (S.D.N.Y. 1961); Continental Distilling Corp. v. Humphrey, 17 F.R.D. 237, 241 (D.D.C. 1955); United States v. Lustig, 16 F.R.D. 138 (S.D.N.Y. 1954); Folley Amusement Holding Corp. v. Randforce Amusement Corp., 1 F.R.D. 496, 498 (S.D. N.Y. 1940); 4 Moore's Federal Practice 1294.

[26] See, e.g., Young v. Motion Picture Ass'n of America, Inc., 28 F.R.D. 2, 5-7 (D.D.C. 1961); Smith v. Crown Publishers Inc., 14 F.R.D. 514 (S.D.N.Y. 1953); Jacobowitz v. Kremer, 7 F.R.D. 110, 111 (S.D.N.Y. 1946).

[27] See A. H. Robins Co. v. Fadley, 299 F. 2d 557, 561-62 (5th Cir. 1962).

II

It may be conceded that witnesses before purely investigative bodies have no constitutional right to the aid of an attorney.[28]

However, the language and legislative history of Section 6(a) of the Administrative Procedure Act indicate that Congress intended to grant to witnesses[29] compelled to appear in agency investigations[30] "the right to be accompanied, represented, and advised by counsel." This view is supported by all of the decided cases[31] and by the leading commentaries on the

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[28] See In re Groban, 352 U.S. 330, 333 (1957). See also Anonymous v. Baker, 360 U.S. 287 (1959).

[29] The first sentence of § 6(a) (5 U.S.C.A. § 1005(a)) applies to "any person compelled to appear" as distinguished, in the second sentence, from "Every party." The distinction is carefully preserved in comments on § 6(a) in the House Committee Report, H.R. Rep. No. 1980, 79th Cong., 2d Sess. 31–32 (1946), reprinted in S. Doc. No. 248, 79th Cong., 2d Sess. 263–64 (1946), and by Senator McCarran on the floor of the Senate. 92 Cong. Rec. 2158 (1946).

[30] The provisions of § 26 apply broadly "except as otherwise provided" in the Act, and the § 6(a) right to counsel is accorded whenever a person is "compelled to appear in person before any agency or representative thereof," without qualification as to the type of agency proceeding which may be involved, in contrast, for example, with § 7 which by its terms is limited to rule-making and adjudicatory proceedings under §§ 4 and 5. The House Committee Report stated that § 6(a) "is a statement of statutory and mandatory right of interested persons to appear themselves or through or with counsel before any agency in connection with any function, matter, or process whether formal, informal, public, or private." H.R. Rep. No. 1980, 79th Cong., 2d Sess. 31–32 (1946), reprinted in S. Doc. No. 248, 79th Cong., 2d Sess. 263–64 (1946).

[31] See Backer v. Commissioner, 275 F. 2d 141 (5th Cir. 1960); Wanderer v. Kaplan, D.D.C., Civil No. 2819–62, Oct. 30, 1962, 1962 CCH Trade Cases ¶¶ 70462 and 70535; Hall v. Lemke, N.D. Ill., Civil No. 62C942, May 7, 1962, 1962 CCH Trade

Act.[32] Schreiber and MCA were therefore entitled to whatever assistance of counsel Section 6(a) con-

Cases ¶ 70338 (restraining order), see Comment, 72 Yale L.J. 1227 (1963); In re Neil, 209 F. Supp. 76 (S.D. W. Va. 1962); United States v. Fancher, 195 F. Supp. 448, 457 n. 18 (D. Conn. 1961); Application of Levine, 149 F. Supp. 642, 643 (S.D.N.Y. 1956); and United States v. Smith, 87 F. Supp. 293, 294 (D. Conn. 1949). See also In re Mead Corp., No. 571–0656, FTC, Jan. 3, 1963, 13 Pike & Fischer, Admin. Law (2d) 117 (1963). Cf. Torras v. Stradley, 103 F. Supp. 737, 739 (N.D. Ga. 1951).

In context the statement in Hannah v. Larche, 363 U.S. 420 (1960) at 445, that agencies when making quasi-judicial determinations are subject to the Administrative Procedure Act, does not mean that the Court thought the Act as a whole was inapplicable to investigative hearings. When at 452–53 the Court rejected the argument that § 7 of the Act applied to the investigative hearings of the Civil Rights Commission, it did not do so on the ground that the Act as a whole was inapplicable to such hearings, but rather upon the narrow ground that § 7 by its terms applied only to rule-making and adjudication.

[32] The Administrative Conference of the United States (created pursuant to Exec. Order No. 10934, Apr. 13, 1961) recently indicated that in its view § 6(a) was applicable "in all agency actions and proceedings, including both public and nonpublic investigations." Bull. No. 7, Administrative Conference of the United States, July 2, 1962, titled "Report of the Fourth Plenary Session, June 29, 1962," p. 4.

The Attorney General's Manual on the Administrative Procedure Act (1947) states (61–62) that § 6(a):

"* * * restates existing law and practice that persons compelled to appear in person before an agency or its representatives must be accorded the right to be accompanied by counsel and to consult with or be advised by such counsel. Such persons are also entitled to have counsel act as their spokesmen in argument and where otherwise appropriate. Senate Comparative Print of June 1945, p. 10 (Sen. Doc. p. 26). It is clear, of course, that this provision relates only to persons whose appearance is compelled or commanded, and does not extend to persons who appear voluntarily or in response to mere request by an agency. Where appearance is compelled,

ferred, and, in this court, the Commission has not contended to the contrary.[33]

It is unnecessary, in this case, to spell out all that "the right to be accompanied, represented, and advised by counsel" may comprehend. The District Court held that in a purely investigatory proceeding of the type involved here, Section 6(a) did not confer the right to cross-examine other witnesses, and Schreiber and MCA have not appealed from this de-

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whether as a party or as a witness, the right to counsel exists."

The Report of the Commission on Organization of the Executive Branch of Government, Task Force Report on Legal Services and Procedure (1955) states (287–88):

"This [Section 6(a)] right was to be accorded in connection with any function, matter, or process, whether formal, informal, public, or private.

* * * * *

"Agency restrictions upon the freedom of a witness or a party to be represented by an attorney in good standing or other duly qualified person in administrative proceedings, whether investigatory or adjudicatory, not only contravene an important purpose of the Administrative Procedure Act, but also derogate from due process of law in the administrative process."

The pertinent portions of 1 Davis, Administrative Law § 8.10 (1958) are set out in this court's opinion.

See also Murchison, Rights of Persons Compelled to Appear in Federal Agency Investigational Hearings, 62 Mich. L. Rev. 485, 492–93 (1964); 26 Albany L. Rev. 276, 277–78 (1962); Newman, Federal Agency Investigations: Procedural Rights of the Subpoenaed Witness, 60 Mich. L. Rev. 169, 170–71 n. 12 (1961–1962); Newman, What Agencies Are Exempt from the Administrative Procedure Act, 36 Notre Dame Law 320 (1960–1961); Gellhorn & Byse, Administrative Law 595 (4th ed 1960); 58 Colum. L. Rev. 395, 403–04 (1958).

[33] At the oral argument the court asked, "You do not argue that it [§ 6(a)] is inapplicable to investigative proceedings?" Counsel for the Commission replied, "We do not, your Honor, we do not."

termination. On the other side, the Commission allowed counsel for Schreiber and MCA to present and argue motions in advance of public hearings and to accompany Schreiber while the latter testified; and on this appeal the Commission has stated that it does not challenge the District Court's determination that counsel must also be permitted to "initiate advice to his client with respect to the propriety or legality of any question asked of his client and to advise his client not to answer any such question deemed improper." [34]

Thus the only issue presented on this aspect of the appeal is the validity of that portion of the District Court's order holding that Section 6(a) confers the right to have counsel object to questions put to his client, and state on the record concise grounds for such objections.

The ordinary meaning [35] of the phrase "represented * * * by counsel" would seem to imply this much. Indeed, to object to questions asked of a witness-client, and articulate the legal basis for the objections, is the function the witness-client would be most likely to expect his attorney to perform, for it is within the attorney's exclusive competence.

The word "represented" was a deliberate addition to Section 6(a), and there is some evidence that it was added to enable counsel to communicate his advice to the presiding officer as well as to his client.

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[34] Paragraph 3(c) of the order. See note 4 of this court's opinion. This concession seems required by the literal language of § 6(a); the right to be "advised by counsel" must mean at least this.

[35] "When Congress used the terms 'right to be accompanied, represented, and advised by counsel,' it must have used the language in the regularly accepted connotation * * *." Backer v. Commissioner, 275 F. 2d 141, 144 (5th Cir. 1960).

A comment upon the insertion of the word, appearing in a Senate Judiciary Committee Print, suggests that "even where the party must be personally present * * * the representation by counsel may be helpful both to the agency concerned and the party."[36] And the statement in the Attorney General's Manual on the Administrative Procedure Act (1947) at page 61 that persons compelled to appear before an agency "are also entitled to have counsel act as their spokesmen in argument and where otherwise appropriate," conveys the same notion. In the course of the Congressional debate the right to counsel conferred by Section 6(a) was stated in the broadest terms.[37]

The Administrative Conference of the United States recently addressed itself to the precise question raised here. The Conference concluded:[38]

> The right to be "represented" by counsel means as a minimum that counsel for any person compelled to appear in person shall be per-

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[36] Senate Judiciary Committee Print, issued May 1945, reprinted in S. Doc. No. 248, 79th Cong., 2d Sess. 26 (1946).

[37] Congressman Francis Walters stated on the floor of the House (92 Cong. Rec. 5652 (1946)):

"Section 6(a) deals with the right of parties to have the advice or representation of counsel or, to the extent that agencies lawfully permit it, representation by nonlawyers. The representation of counsel contemplated by the bill means full representation as the term is understood in the courts of law. Counsel may thus receive notices, decisions, and awards. Agencies are not authorized in any manner to ignore or bypass legal representatives that parties have selected for themselves pursuant to this section."

[38] Bull. No. 7, Administrative Conference of the United States, July 2, 1962, titled "Report of the Fourth Plenary Session, June 29, 1962," p. 4. See Murchison, Rights of Persons Compelled to Appear in Federal Agency Investigational Hearings, 62 Mich. L. Rev. 485, 496 (1964).

mitted to make objections on the record and to argue briefly the basis for such objections in connection with any examination of his client.

The Supreme Court's "approval" in *Hannah* v. *Larche*, 363 U.S. 420 (1960), of Rule 1.40 of the Federal Trade Commission's Rules of Practice (which allowed counsel for a subpoenaed witness to accompany and advise his client but "not, as a matter of right, otherwise participate in the investigation") is not inconsistent with this reading of Section 6(a). In *Hannah* the Supreme Court was commenting only upon whether Rule 1.40 met constitutional standards, not whether it satisfied Section 6(a) of the Administrative Procedure Act.[39] The Court referred with equal "approval" to the practice of the Securities and Exchange Commission limiting the role of counsel for witnesses in investigative inquiries to advising the witness and "making objections to questions which assertedly exceed the scope of the order of investigation." 363 U.S. at 447 n. 26.

The Commission contends that since "representation" is not defined in the Administrative Procedure

[39] Murchison, Rights of Persons Compelled to Appear in Federal Agency Investigational Hearings, 62 Mich. L. Rev. 485, 493 (1964). After *Hannah* the Federal Trade Commission modified its rules to permit counsel, in public investigatory proceedings, to object to questions asked of his witness-client, to advise his client not to answer, and to state his reasons on the record. The Commission broadened witnesses' rights to the assistance of counsel in other respects, and indicated that it did not act wholly under the compulsion of § 6(a). It stated, however, "We are convinced that these rules effectuate the policy of Congress, and will not contribute to any 'regulatory lag' or delay investigational hearings." In re Mead Corp., No. 571–0656, FTC, Jan. 3, 1963, 13 Pike & Fischer, Admin. Law (2d) 117, 122 (1963). See 16 C.F.R. § 1.40.

Act, the degree of participation by counsel which is to be permitted should be left to the discretion vested in the Commission by Section 4(j) of the Communications Act of 1934, and that the determination which the Commission has made as to the extent of participation to be allowed in the present case is reasonable in the light of the type of inquiry involved, and not an abuse of discretion.[40]

Unquestionably a large measure of discretion over its procedures is vested in the Commission, as has been noted.[41] But the authority conferred upon the Commission by Section 4(j) of the Act of 1934 is limited by Section 6(a) of the Administrative Procedure Act.[42] The latter "is a statement of statutory and mandatory right." H.R. Rep. No. 1980, 79th Cong., 2d Sess., 31–32 (1946), reprinted in S. Doc. No. 248, 79th Cong., 2d Sess. 263–64 (1946). Precisely what the right to be "represented * * * by counsel" comprehends may depend to some extent upon the nature of the inquiry, and other surrounding circumstances, but it cannot reasonably import less, as to a witness in an investigative proceeding, than the right to have counsel object to questions put to the witness and state his reasons in the record;

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[40] Since the Commission has conceded that counsel should be permitted to advise his client not to answer, and that the client may then state his position on the record, it is difficult to credit the Commission's repeated suggestion that the elimination of this circumlocution by permitting counsel himself to object and concisely state his reasons on the record "would tend to make the investigation interminable."

[41] Notes 6 and 10, supra, and related text.

[42] American Communications Ass'n v. United States, 298 F. 2d 648, 650 (2d Cir. 1962).

"otherwise," as Judge Yankwich stated at the hearing below, "it does not mean anything." [43]

[43] Judge Yankwich's decision as to the meaning of § 6(a) was followed in all particulars by Judge McLaughlin in Wanderer v. Kaplan, D.D.C. Civil No. 2819-62, Oct. 30, 1962, 1962 CCH Trade Cases ¶70536.

APPENDIX B

United States Court of Appeals for the Ninth Circuit

No. 17990

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

TAFT B. SCHREIBER AND MCA, INC., APPELLEES

Judgment

APPEAL from the United States District Court for the Southern District of California, Central Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed, except that subparagraphs (b) and (c) of paragraph VII of the Conclusions of Law are stricken and the order of the said District Court is modified to conform to the opinion of this Court.

Filed and entered February 17, 1964.

APPENDIX C

United States Court of Appeals for the Ninth Circuit

Excerpts from Proceedings of Monday, May 4, 1964

Before: JERTBERG and BROWNING, *Circuit Judges;* and FOLEY, JR., *District Judge*

Order Denying Petition for Rehearing en Banc

On consideration thereof and by direction of the Court IT IS ORDERED that the petition of appellant Federal Communications Commission filed March 28, 1964, and within time allowed therefore by rule of Court, and valid extension thereof, for a rehearing of above cause be, and hereby is denied.

APPENDIX D

STATUTES INVOLVED

Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001 *et seq.*:

* * * * *

SECTION 3(c): *Public Records.*—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

* * * * *

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*:

SECTION 4(i): The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

SECTION 4(j): The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. * * * Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

SECTION 4(k): The Commission shall make an annual report to Congress, copies of which shall be distributed as are other reports transmitted to Congress. Such reports shall contain—

(1) such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of interstate and foreign wire and radio communication and radio transmission of energy.

* * * * * *

SECTION 303: Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—

* * * * * *

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

* * * * * *

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

* * * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

SECTION 403: The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act, or concerning which any question may arise

under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money.

SECTION 409(f): Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

(g) Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpena issued to any common carrier or licensee or other person, issue an order requiring such common carrier, licensee, or other person to appear before the Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

SECTION 412: The copies of schedules of charges, classifications, and of all contracts, agreements, and arrangments between common

carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual or other reports of carriers and other persons made to the Commission as required under the provisions of this Act shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of and extracts from any of said schedules, classifications, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the Secretary, under the Commission's seal, shall be received in evidence with like effect as the originals: *Provided,* That the Commission may, if the public interest will be served thereby, keep confidential any contract, agreement, or arrangement relating to foreign wire or radio communication when the publication of such contract, agreement, or arrangement would place American communication companies at a disadvantage in meeting the comptition of foreign communication companies.

APPENDIX E

Amendment to Part 1 of the Rules and Regulations of the Federal Communications Commission, 47 C.F.R., adopted on September 2, 1964:

The undesignated center heading preceding § 1.21 is amended, and § 1.27 is added, to read as follows:

PARTIES, PRACTITIONERS, AND WITNESSES

* * * * *

§ 1.27 *Witnesses; right to counsel.*

Any individual compelled to appear in person in any Commission proceeding may be accompanied, represented, and advised by counsel as provided in this section. (Regulations as to persons seeking voluntarily to appear and give evidence are set forth in § 1.225.)

(a) Counsel may advise his client in confidence, either upon his own initiative or that of the witness, before, during, and after the conclusion of the proceeding.

(b) Counsel for the witness will be permitted to make objections on the record, and to state briefly the basis for such objections, in connection with any examination of his client.

(c) At the conclusion of the examination of his client, counsel may ask clarifying questions if in the judgment of the presiding officer such questioning is necessary or desirable in order to avoid ambiguity or incompleteness in the responses previously given.

(d) Except as provided by paragraph (c) of this section, counsel for the witness may not examine or cross-examine any witness, or offer documentary evidence, unless authorized by the Commission to do so.

U.S. GOVERNMENT PRINTING OFFICE: 1961

Office-Supreme Court, U.S.
FILED
OCT 12 1964
JOHN F. DAVIS, CLERK

No. 482

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, *Petitioners*

v.

TAFT B. SCHREIBER and MCA INC.

BRIEF OF TAFT B. SCHREIBER AND MCA INC. IN OPPOSITION

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IN THE

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UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, *Petitioners*

v.

TAFT B. SCHREIBER and MCA INC.

BRIEF OF TAFT B. SCHREIBER AND MCA INC. IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Appeals (Pet. App. A, pp. 13-57) are reported at 329 F. 2d 517. The opinion of the District Court appears at 201 F. Supp. 421.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. B, p. 58) was entered on February 17, 1964. A timely petition for rehearing *en banc* was denied (Pet. App. C, p. 59) on May 4, 1964. On August 3, 1964, the Chief Justice granted Petitioners an extension of time within

which to file a petition for a writ of certiorari to and including September 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Where the record evinces the Federal Communications Commission's intention to probe deeply during an investigatory hearing into the activities and operations of respondent MCA, a company which is in a highly competitive industry and one in which trade secrets are of great importance and which company is not subject to the regulatory jurisdiction of the Commission, did the Court of Appeals err in refusing to reverse the District Court Order (made after a thorough review of the voluminous record) which required that all further information adduced from respondents be held in confidence until the interrogation of respondents had been completed and the questions and answers could be placed before the District Court in the context of the entire record, at which time the District Court would entertain a motion by the Commission to permit the disclosure of the information so elicited?

STATUTES INVOLVED

The pertinent portions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*, and the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001 *et seq.*, are set forth in Appendix A, p. 15.

STATEMENT

Taft B. Schreiber is Vice-President of MCA Inc. and President of Revue Studios, a division of MCA. Revue Studios engages in the production of filmed television shows and leases studio facilities to other producers.

MCA (primarily through subsidiaries) also distributes television shows to networks and television stations, and at the time of the Commission's hearing represented artists and production companies in various branches of the entertainment industry. There is no dispute that there is now, and has been, vigorous competition in each of these fields. MCA owns no television or radio stations and neither it, nor any of its subsidiaries or related companies, is a licensee of, or subject to, regulation by the Federal Communications Commission.

The present controversy between appellees and the Commission arises out of a broad Commission investigation of the television industry. The investigation has been under way for a number of years and under various directives. The present inquiry stems from an Order of the Commission released on February 27, 1959, FCC 59-166 [Pet. Ex. 1], which directed an inquiry into the "policies and practices pursued by the networks and others in the acquisition, ownership, production, distribution, selection, sale and licensing of programs for television exhibition". This Order was supplemented by a Commission Order released on November 10, 1959, FCC 59-1136 [Pet. Ex. 3], which directed that the inquiry be enlarged to embrace "policies, practices, mechanics and surveillance pursued and carried out by networks, station licensees and others in connection with the acquisition, ownership, production, distribution, selection, sale and licensing of programs for radio and television exhibition. . . . "

In response to a subpoena duces tecum, Shreiber appeared in person at the Commission's hearing in Los Angeles. He produced certain subpoenaed material but declined to produce other material unless

it be accepted in confidence. After an exchange between Commission counsel and Schreiber failed to clarify to the former's satisfaction what Schreiber meant by "in confidence", the attorney for respondents attempted to state their legal position. The Hearing Examiner cut him off immediately, citing so-called "ground rules" which the Hearing Examiner had earlier promulgated *ex parte*. These "ground rules", as enunciated by the Hearing Examiner, provided that counsel could not advise a witness unless the lay witness recognized a need to consult with his counsel and secured permission from the Examiner to consult with his attorney (a permission not always given[1]); counsel could not volunteer information to the witness, could not initiate advice to the witness that a question or area of inquiry was improper, and could not make objections and could not make any statements whatsoever during the course of interrogation. When respondents' attorney attempted to have the record indicate the position of his clients on these critical points, the Hearing Examiner threatened to have respondents' attorney held in contempt for speaking at all. Schreiber thereupon refused to give further testimony.[2]

The Hearing Examiner thereafter reaffirmed his intention to follow the "ground rules" and further found that respondents' contention that the material sought by the Commission was confidential "to be without merit". On appeal from the Hearing Examiner's rul-

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[1] See for example Tr. 4646-4647.

[2] These events are reported in the transcript of the hearings, pages 4925-4935. The numerous individual volumes which contain the transcript are included with Petitioner's Exhibits 15A through R. References to the transcript are to "Tr." followed by the specific pages.

ing, the Commission affirmed the Hearing Examiner in all respects and left to the Hearing Examiner the responsibility for determining the extent of confidentiality to be accorded to the material elicited from respondents.

Prior to the time set for the reconvened hearing, respondents' attorney moved that the subpoena be quashed. He suggested, however, that, in order to avoid a needless expenditure of time and effort on the part of all concerned, Schreiber be permitted in the first instance to testify in a closed session and that the information so received be held in confidence until the courts should have an opportunity to rule on respondents' contentions; should the Commission prevail, the information could be made public without any further action. This alternative was rejected by the Commission. At the resumed hearing, the Hearing Examiner reaffirmed his insistence that the "ground rules" continue to apply. When Schreiber declined to testify under the duress of such "ground rules", the Hearing Examiner warned Schreiber of the possibility that the criminal penalties provided in Section 409(m) of the Communications Act of 1934, 48 Stat. 1096, as amended, 47 U.S.C. Section 409(m), would be invoked.

Upon Schreiber's refusal to retreat from his position that he and the company he represented were entitled to the meaningful assistance of their counsel and that the information being sought from him should not be made public, the Commission filed a petition in the United States District Court for the Southern District of California for enforcement of its subpoena and Orders. After two hearings the District Court signed a set of Findings, Conclusions and Order. Finding XI [R. 274-275] reads as follows:

"The record herein, including but not limited to, the testimony in the extensive hearings held by the Commission in its network programming inquiry, make it necessary that in protection of respondents' rights and to preclude disclosure of trade secrets of which competitors might take advantage, all further interrogation of, and all further testimony given by, respondents shall be given in non-public sessions, and shall be retained and maintained in confidence by the Commission."

The Disctrict Court's Order [R. 279-280] required, among other things, that:

"[A]ny further interrogation of respondents and any documents produced by respondents be taken and held by the Commission in private and confidential session, that the public be excluded therefrom, that all testimony adduced and documents produced be maintained in confidence by the Commission, that the Commission by motion duly made and served, may move the Court upon the conclusion of such interrogation and production for an order, should good cause exist therefor, permitting such testimony and documents to be made public, and that respondents shall retain the right to oppose such motion if and when so made.

IT IS FURTHER ORDERED that in the course of any further interrogation of respondents:

(a) . . . .

(b) Respondents shall have the right to have counsel accompany respondents when testifying, the right to have respondents' counsel object to any questioning by the Commission, its counsel or the Hearing Examiner deemed improper by respondents' counsel, the right to have counsel for respondents present on the record concise grounds and reasons for any such objection, and the right to have counsel for respondents, without inter-

> ference by the Commission, its counsel or the Hearing Examiner, initiate advice to his client with respect to the propriety or legality of any question asked of his client and to advise his client not to answer any such question deemed improper."

On appeal a divided Ninth Circuit held that Section 6(a) of the Administrative Procedure Act, 60 Stat. 240 (1946), 5 U.S.C. §1005(a) did not require that respondents be afforded the right to counsel as outlined in the District Court's Order, and modified the Order accordingly; however, by the same division, the Ninth Circuit upheld the District Court's Order with respect to confidentiality. In ruling on the confidentiality issue, the majority stated [Pet. 27]:

> "We hold, therefore, that the Trial Judge did not abuse his discretion; but, on the contrary, established a fair and just procedure whereby a most important investigation could proceed without being unduly disrupted, obstructed or prolonged, and at the same time afford appellees protection against the improvident disclosure of possible valuable trade secrets."

Notwithstanding the Ninth Circuit's ruling pertaining to the right to counsel, the Commission on September 2, 1964, adopted an amendment to its Rules and Regulations [Pet. 64-65] which guarantees to witnesses before it the right to counsel to which respondents have contended throughout they were entitled under Section 6(a) of the Administrative Procedure Act. In reliance upon the advice of the General Counsel of the Commission that the amended rule applies in any subsequent hearing, respondents have not petitioned for *certiorari* from that portion of the Ninth Circuit's Order which pertains to the right to counsel.

ARGUMENT

The courts below were clearly correct in qualifying the Commission's process to require that in the first instance testimony to be obtained from respondents be held in confidence pending a later court determination. The decisions do not conflict with the decisions of this Court or other courts of appeals and no questions of general importance are raised by the petition. Moreover, consideration by this Court would, at the present time, be premature. Therefore, review by this Court is not warranted.

1. The Ninth Circuit did not err when it upheld the sensible approach of the District Court in the course of enforcing the Commission's Orders. The record before the District Court amply supports its Finding of Fact XI [R. 274-275] that it is necessary in the protection of respondents' rights and to preclude disclosure of trade secrets of which competitors might take advantage that further interrogation of the respondents be conducted in non-public sessions, and that the evidence adduced thereby be held in confidence, and amply supports it Order [R. 279-280] to the effect that the Commission could, if good cause existed, obtain an Order from the District Court permitting such evidence to be made public. The record reveals a concerted effort on the part of the Commission to delve deeply into the business affairs of MCA. The very Order which the Commission sought to have the District Court enforce without qualification [Pet. Ex. 12, p. 7] sets the tone for the proceeding by directing that the "policies, practices and activities of MCA Inc. in connection with the production, casting, packaging, selection and sale of programs for television exhibition" be inquired into during the course of the hearing.

Prior to respondent Schreiber's taking the stand, numerous questions were put to witnesses concerning their competitive and other relationships with MCA [e.g. Tr. 4019-4021, 3979-3980, 4273-4278, 4339-4343, 4437-4438]. The Commission also introduced into evidence detailed financial and corporate data concerning MCA [e.g. Pet. Ex. 10]. Respondents are unaware of any other occasion during the hearings when even remotely comparable material pertaining to other companies was placed in the public record. Many other occurrences which are part of the record buttress the District Court's conclusion that respondents were well grounded in their concern that "the testimony to be given might result in disclosure of trade-secrets, of which competitors might take advantage. . . ." 201 F. Supp. 421 at Page 425. Indeed, the Commission has even stated that one of the purposes of disclosure is to make available to station licensees, the broadcast industry, and the public (as well as to the Commission and to Congress) information concerning the "processes involved in the production, sale, distribution, et cetera, of broadcast programming. . . ." [Pet. Ex. 12, p. 2]

The District Court was faced with a situation in which a hearing ostensibly aimed at the television industry as a whole, in fact appeared to have been focused upon MCA. Neither at its own proceedings nor before the District Court, nor before the Ninth Circuit, nor in its petition to this Court, has the Commission given any indication of an intention to limit its inquiry to anything less than the broad areas delineated in its various Orders.

The Government argues that the information sought from respondents is needed so that the Commission

may intelligently regulate the television industry and make recommendations to Congress [Pet. 8]. The Petition implies that the Commission cannot perform this function in the face of an authorization by the Circuit Court of Appeals to the District Court to "exercise its discretion on the issue of confidentiality *vel non* irrespective of the prior decision of the Commission" [Pet. 9]. This is not the case. The District Court was faced with a situation where the Commission's Rules made no provision for a hearing on respondents' claim as to confidentiality. Moreover, respondents' offer to supply this information, initially on a confidential basis, subject to a ruling by the District Court, was summarily rejected by the Commission. The Commission, without knowing what the information was, declared, in effect, that a judgment could be made that the confidential treatment was unwarranted. The Commission even went so far as to seem to require a full *public* disclosure of the material in question in order to rule on whether or not it was confidential. The District Court refused to accept such a one-sided and illogical appraisal. Instead, it carefully evaluated the interests involved and issued an Order which was calculated to avoid delays in any subsequent proceedings while at the same time protecting MCA from any unwarranted interim disclosure of competitive information. The Commission was left free to proceed with all phases of its investigations, except for the sensible requirement that it maintain in confidence sensitive competitive data until such time as the District Court, with the aid of the entire record, would have an opportunity to learn what specific information was involved.

2. The decision of the Ninth Circuit is consistent with the decisions reached by other Courts of Appeals

and by District Courts in other circuits and does not conflict with any decision of this Court or of any Court of Appeals. The Government asserts [Pet. 10] that the "approach" of the Ninth Circuit conflicts with that of the District of Columbia Circuit in *American Sumatra Tobacco Corp.* v. *Securities and Exchange Commission*, 110 F. 2d 117 (D. C. Cir. 1940).[3] The Government misreads *Sumatra*. In that case, a company subject to the jurisdiction of the SEC requested the Commission to maintain in confidence certain financial information filed as part of a registration statement. The SEC pursuant to published rules and regulations held a hearing on this question, in the meantime keeping the information confidential. After a hearing the SEC concluded that the information should be made public. An appeal was thereupon taken to the Court of Appeals. That Court, after reviewing the entire record, sustained the Commission's action. It is apparent that the Court of Appeals placed great reliance on the fact that the whole scheme of the Securities Act depended upon public disclosure of filed information and also upon a procedure which specifically permitted the filing of the information in the first instance on a confidential basis, subject to public disclosure only after a hearing by the agency and after judicial review of the agency order by the Court of Appeals.[4] In the instant case, MCA is not subject to regulation by the Commission, the regulatory scheme does not rely primarily upon a disclosure concept, and no administra-

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[3] The other cases cited by the Government [Pet. 11] merely contain general statements relating to the responsibility of agencies to formulate their procedures.

[4] See *American Sumatra Tobacco Corp.* v. *Securities and Exchange Commission*, 93 F. 2d 236 (D. C. Cir. 1937).

tive procedure was available for receiving in the first instance the challenged information in confidence, subject to disclosure only after an administrative hearing and judicial review.

The decision of the Ninth Circuit in the case at bar, upholding the District Court's ruling with respect to confidentiality, is consistent with numerous cases which have recognized the need to qualify the processes of administrative agencies in order to avoid the great harm which may befall private parties from the unwarranted disclosure of business data. See, for example, *Bank of America Nat. Trust and Sav. Ass'n.* v. *Douglas,* 105 F. 2d 100 (D. C. Cir. 1939) which, like the *American Sumatra* case cited by the Government, was decided by the District of Columbia Court of Appeals. See also, *Federal Communications Commission* v. *Cohn,* 154 F. Supp. 899, 912-3 (S.D.N.Y. 1957); *Federal Trade Commission* v. *Menzies,* 145 F. Supp. 164, 171 (D. Md. 1956); *aff'd without point being in issue,* 242 F. 2d 81 (4th Cir. 1957), *cert. denied,* 353 U.S. 957 (1957); *Federal Trade Commission* v. *Bowman,* 149 F. Supp. 624 (N.D. Ill. 1957) (contention by defendant that "disclosure of confidential business information . . . might prove beneficial to competitors if made public" basis for requiring information to be held in confidence), *aff'd without point being in issue,* 248 F. 2d 456 (7th Cir. 1957).

3. Review by this Court at this time is not appropriate. The District Court's Order does not specify what information, if any, must be held in confidence for an indefinite period of time. It was in no position to make such a determination without having the questioned information before it. For that issue to be presented properly to the District Court, the hearing

before the Commission would have to be resumed, questions would have to be put to respondents which respondents contend would result in unwarranted disclosure of information, and the Commission would have to disagree. Then with specific information contained in a record, the Commission could petition the District Court for an Order authorizing it to make public the information so elicited. If the District Court were to rule unfavorably upon the Commission's petition, then, for the first time, would the Commission be aggrieved in any practical way. At that time, with both the specific information involved and with the District Court's explanation of the standard applied by it, an appellate court could ascertain whether the District Court had erred. Until this point is reached, the dispute is largely academic and accordingly it would be premature for this Court to consider the case.

On the state of the current record, this Court could obviously not decide in advance what information, if any, to be elicited in the future from respondents would be entitled to confidential treatment. Indeed, in the state of the current record it is unlikely that any broad criteria could even be enunciated with respect to this matter. Even if the judgment of the lower court were to be reversed, respondents would still have the right at the public hearing to refuse to answer specific questions until the courts would have had an opportunity to pass upon the issue of confidentiality. Accordingly, review by this Court at this time would not move the matter any closer to resolution.

CONCLUSION

The adoption by the Commission of rules of procedure with respect to the right to counsel which are in accord with respondents' legal position on this

matter has eliminated from this case the only important issue. As to the matter of confidentiality, the Government does not question the District Court's authority to impose safeguards in the course of enforcing agency process; the Government merely questions the propriety of the particular safeguards imposed by the District Court in this particular case. We believe these safeguards are necessary, appropriate and consistent with good sense and orderly procedure. Moreover, review at this time—when the information in question is not before the Court—is premature. Finally, because of the nature of this case and because of its present procedural status, any decision this Court might render, were it to grant the Government's petition, would not have any general applicability and would not serve as a meaningful guideline in the future either to lower courts or to administrative agencies. Accordingly, the petition for certiorari should be denied.

Respectfully submitted,

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October 12, 1964

APPENDIX A

Statutes Involved

Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 151 *et seq.*:

* * * * * * * * * * *

Section 6(a): *Appearance.*—Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of agency business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding.

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*:

* * * * * * * * * * *

Section 409(m): Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or, to produce books, papers, schedules or charges, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission, shall be guilty of a misdemeanor and upon

conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $100 nor more than $5,000 or by imprisonment for not more than one year, or by both such fine and imprisonment.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 482

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

TAFT B. SCHREIBER AND MCA, INC.

REPLY BRIEF OF THE FEDERAL COMMUNICATIONS COMMISSION ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In our petition we pointed out that the decision of the Ninth Circuit upholds the district court's authority to decide, in the first instance, the degree of confidentiality to be accorded information sought by the Commission, and places upon the agency the burden of justifying public disclosure of such information. We urged that this holding ran counter to judicial and statutory authority which stand for the proposition that the agency has the right to decide this question initially and that the burden of demonstrating the need for confidentiality rests on the party who seeks it. It is no answer to say, as respondents do, that the court's order represented a "sensible approach." The issue we raise is whether the court should institute a procedure or whether, as we contend, its function is to review the action of the agency

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in order to determine whether an abuse of discretion has occurred.

Respondents seek to avoid this basic question and to justify the decision below on the grounds that MCA was being treated differently from others who had been called on to testify and that no safeguards had been specified by the Commission to prevent disclosure of information that could properly be deemed confidential. Both contentions are unfounded. As the largest talent representative in the United States and as a major "packager" of television programs, MCA was an important source of information for purposes of the Commission's investigation. But other parties, including MCA's chief competitor in the talent field, had been called to testify and had freely complied with requests for the same kind of information that the Commission sought from MCA. Moreover, procedures to accommodate claims of confidentiality had been plainly set forth (R. 12–13). MCA could assert such claims with respect to any item of information called for and the presiding officer was empowered to take the evidence *in camera* if non-disclosure was justified. And, in the event of an unfavorable ruling, respondents would still have the right (as they ultimately concede, Brief, p. 13) not to have the material in question publicly disclosed until the court had passed on the issue of confidentiality.

The authority of the Commission to establish procedures of this kind is clear, 47 U.S.C. 154(j), *F.C.C.* v. *WJR*, 337 U.S. 265, 282; and where its actions do not constitute an abuse of discretion its judgment

should be upheld. *American Sumatra Tobacco Corp.* v. *S.E.C.*, 93 F. 2d 236, 239 (C.A. D.C.). Respondents attempt (Brief, p. 11) to distinguish this case from *American Sumatra* by arguing that MCA is not subject to FCC regulation; that the Commission had prescribed no procedure for dealing with the question of confidentiality; and that, unlike the situation involved in proceedings before the SEC, the regulatory scheme here does not rely on a concept of disclosure. Those distinctions are insubstantial and in any event irrelevant to the question whether the court can properly consider *de novo* the issue of confidentiality.

Although MCA is not subject to the Commission's licensing authority, the right of the Commission to obtain the information in question has not been contested [1]—only the manner in which it is to be treated.

While it is true that the SEC had adopted procedural rules dealing with the question of confidentiality, the Commission's orders governing the course of the hearing in this case fully specified the procedure to be followed.[2] This procedure allowed respondents to be heard on the question of confidentiality and, as noted *supra*, there could be no public disclosure until the issue had been reviewed by the courts. In the circumstances, the fact that one agency proceeded by

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[1] Cf. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186; *Stahlman* v. *F.C.C.*, 126 F. 2d 124 (C.A. D.C.).

[2] Respondents' contention below that this did not afford adequate notice was rejected by both the district court and the court of appeals, and no further review of the question was sought. 201 F. Supp. 421, 425; 329 F. 2d 517, 527.

rule and the other by *ad hoc* procedures of which all parties were fully apprised is of no significance.

Lastly, considerations favoring public disclosure are not confined to the SEC. On the contrary, public disclosure is a principle of general applicability common to all administrative agencies. See, *e.g.*, *E. Griffith Hughes, Inc.* v. *Federal Trade Commission*, 63 F. 2d 362 (C.A. D.C.). Initial determination of the question properly belongs with the agency, and the burden of establishing the need for non-disclosure is plainly on the party who seeks suppression. Administrative Procedure Act, Section 3(c), 5 U.S.C. 1002 (c); compare Federal Rules of Civil Procedure, Rule 30(b).

This case is ripe for review. For the question is not, as respondents contend, whether a particular ruling on the question of confidentiality is correct but where the responsibility to make that ruling lies. The decision below holds that a district court may set aside the procedures established by the Commission and that it has broad discretion to establish others *de novo*. Because of the conflict represented by this holding and because the issue has significant con-

sequences for all regulatory agencies, review by this Court is warranted.

Respectfully submitted.

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NOVEMBER 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 482

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

TAFT B. SCHREIBER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

OPINIONS BELOW

The opinions of the court of appeals are reported at 329 F. 2d 517. The opinion of the district court is reported at 201 F. Supp. 421.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1964 (R. 171). A timely petition for rehearing *en banc* was denied on May 4, 1964 (R. 177). On August 3, 1964, the Chief Justice granted an extension of time within which to file

a petition for a writ of certiorari to and including September 10, 1964 (R. 177). The petition was filed on that date and granted on December 7, 1964 (379 U.S. 927). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has authority, subject only to judicial scrutiny for abuse of discretion, to determine if testimony given and documents received pursuant to subpoena at an authorized investigatory hearing should be kept confidential.

2. Whether the Commission may impose on the witness who requests confidentiality for information received at an investigatory hearing the burden of justifying such treatment.

STATUTES INVOLVED

Administrative Procedure Act, Section 3(c), 60 Stat. 237, 238, 5 U.S.C. 1002(c):

> Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.;* Section 4:

> (i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

(k) The Commission shall make an annual report to Congress, copies of which shall be distributed as are other reports transmitted to Congress. Such reports shall contain—

(1) such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of interstate and foreign wire and radio communication and radio transmission of energy;

* * * * *

Section 303:

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

* * * * *

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

* * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

Section 403:

The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money.

Section 409:

(f) Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United

States, at any designated place of hearing. And in case of disobedience to a subpena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

(g) Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpena issued to any common carrier or licensee or other person, issue an order requiring such common carrier, licensee, or other person to appear before the Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Section 412:

The copies of schedules of charges, classifications, and of all contracts, agreements, and arrangements between common carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual or other reports of carriers and other persons made to the Commission as required under the provisions of this Act shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of and extracts from any of

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said schedules, classifications, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the secretary, under the Commission's seal, shall be received in evidence with like effect as the originals: *Provided,* That the Commission may, if the public interest will be served thereby, keep confidential any contract, agreement, or arrangement relating to foreign wire or radio communication when the publication of such contract, agreement, or arrangement would place American communication companies at a disadvantage in meeting the competition of foreign communication companies.

STATEMENT

This case involves a subpoena and orders issued in the course of an investigatory proceeding conducted by the Federal Communications Commission pursuant to Section 403 of the Communications Act of 1934, as amended, 47 U.S.C. 403 (p. 4, *supra*). The proceeding was initiated on February 27, 1959, and was financed by a specific Congressional appropriation.[1] During the Senate hearings on the appropriation, Chairman McConnaughey of the Commission advised:[2]

> The House also added $80,000 to our request for "such expenses as are necessary to make a

[1] Independent Offices Appropriation Act, 1956, 69 Stat. 199.

[2] Hearings before the Subcommittee of the Senate Appropriations Committee, Independent Offices Appropriations for 1956, 84th Cong., 1st Sess., pp. 293, 294. See also Hearings before the Subcommittee of the House Appropriations Committee, Independent Offices Appropriations for 1956, 84th Cong., 1st Sess., pp. 663–664.

> study of radio and television network broadcasting." The Commission agrees that such a study, particularly as relates to television, would be very worthwhile. * * *
>
> The objective of such a study would be to obtain for the first time comprehensive information concerning the respective roles played by networks, advertisers, agencies, talent, film producers and distributors, and other major elements in the television industry.
>
> Only with this information can the problems affecting the further expansion of television outlets be adequately identified and evaluated, and appropriate recommendations made for their solution. To accomplish the program it would be necessary to consider not only information now in the Commission's files but also to collect data from outside sources.

Chairman McConnaughey then explained that the material collected would be analyzed and would form the basis of recommendations to Congress "as would appear necessary and desirable in the light of the analysis." On the floor of the Senate, Senator Magnuson, Chairman of the Appropriations Subcommittee and also Chairman of the Senate Commerce Committee, explained that the investigation was important "because we [Congress] will be able to draw upon the facts which are obtained by an examination of the contracts" of the industry. 101 Cong. Rec. 7629.

1. *The Commission proceedings.*—As an initial step in this investigation, the Commission ordered a hearing to discover "the policies, practices, mechanics and surveillance pursued and carried out by networks,

station licensees and others in connection with the acquisition, ownership, production, distribution, selection, sale and licensing of programs for radio and television exhibition * * * and the reasons and necessity in the public interest for said policies and practices * * *" (R. 27). 24 F.R. 1605. In its order the Commission noted that the information it sought was necessary (1) as a part of its general investigation of television programs undertaken pursuant to the Independent Offices Appropriations Act; (2) to determine what, if any, rules, regulations, legislation, or other actions were necessary or desirable in the public interest in connection with television programming; (3) to determine the steps necessary to encourage larger and more effective use of television in the public interest; (4) to determine where the public interest lies in the granting of construction permits, station licenses, and modifications and renewals; (5) to report to Congress on matters relating to the regulation of broadcasting; and (6) to build a public record on which both Congress and the Commission might act (R. 20–22).

The Commission authorized its chief hearing examiner to conduct the investigation. He was empowered to subpoena witnesses, compel their attendance, and require the production of papers deemed relevant to the inquiry (R. 22). The investigatory proceeding was to be "a public proceeding except that the said presiding officer may order non-public sessions of the said investigatory proceeding where and to the extent that the public interest, the proper dispatch of the

business of said proceeding, or the ends of justice will be served thereby" (R. 22).

Public sessions were held in Los Angeles, California, in October 1960, at which time evidence was received concerning the functions, policies and practices of a number of Hollywood-centered television production companies, talent agencies, talent representatives, program "packagers,"[3] sales representatives and others (R. 11–12). Respondent MCA, Inc., was one of the largest packagers and producers of network television programs. As of 1960, that company owned approximately 1,657 television negatives, substantially all of which had had at least one exhibition on a national network or equivalent exhibition in syndication (R. 52). For the 1959–1960 season, the company produced seven film series of its own, utilizing 121 hours of evening viewing time (R. 52). In addition, for the same season it associated with others in the production of eight film series which occupied 137.5 hours of time during the season (R. 52). The company also owned 700 pre-1948 feature-length movies for which it had paid $50,000,000 (R. 70) and a 370-acre studio which it had purchased in 1959 for $11,250,000 (R. 71).

On October 17, 1960, the chief hearing examiner issued a subpoena duces tecum directed to respondent Taft B. Schreiber, a vice-president of MCA, directing him to appear at the hearing and to produce certain

[3] "Packagers" develop and assemble the talent and scripts for a particular program or programs. A "producer" has general charge of the process of preparing the package for television production.

documents described in annexes to the subpoena (R. 12). Schreiber appeared and produced the material required by Annex A of the subpoena[4] (R. 30). He refused, however, to produce without qualification the material required by Annex B,[5] which included a list of the programs packaged by MCA, although he admittedly had such a list in his possession in the hearing room (R. 30–32). He agreed to testify regarding the subpoenaed documents and to produce them only "if the Commission will take this information and assure us that it will be held confidential,

[4] "(A) A list by name or title of all television programs whether series programs, special programs, or otherwise, which appeared or were exhibited by or through the facilities of the television networks operated by NBC, CBS, or ABC since September 1, 1958, which programs were produced by MCA, Inc. or Revue Productions, Inc. and/or in which MCA, Inc. or Revue Productions, Inc. has or had a financial or proprietary interest or with regard to which MCA, Inc. or Revue Productions, Inc. is or was entitled to receive or has received a percentage of the profits or other compensation or fees in connection with the production or exhibition of such programs other than remuneration or compensation for the representation as agent of individual natural persons as talent" (R. 6–7).

[5] "(B) A list of all television programs whether series programs, special programs, or otherwise, which appeared on or were exhibited by or through the facilities of the television networks of NBC, CBS, or ABC, since September 1, 1958, in which MCA, Inc. or any predecessor affiliate or subsidiary of MCA, Inc. acted as packager and/or, by agreement or otherwise, is entitled to receive or has received a percentage of the cost or selling price of said program or was or is entitled to receive or has received other compensation, remuneration or fees in connection with the packaging, licensing for broadcast or selling of said program, otherwise than as remuneration or compensation for the representation as agent of individual natural persons as talent" (R. 7).

will not be published, and will not be made available to other people, other than those on the Commission, and that serve the Commission * * *" (R. 32). The relevant colloquy regarding the production of the documents was as follows (R. 30–31):

> Q. Well, will you now produce the information, sir?
>
> A. We will be happy to produce it on the basis of its being kept confidential.
>
> Q. I ask you again, sir, will you produce the information for us here now as called for by the subpoena?
>
> A. I respectfully submit that we cannot produce confidential information for this record.
>
> Q. Well, now, is it your contention, sir, that the information called for in subparagraph B of the Annex is confidential, is that it?
>
> A. Yes, sir.
>
> Q. Well, will you tell us, Mr. Schreiber—are you familiar with the testimony given here yesterday by the representatives of the William Morris Agency?
>
> A. Just by hearsay.
>
> Q. I see. Well, generally, will you tell us why, if you wish to do so—why this information called for in subparagraph B is, in your judgment, confidential information?
>
> A. Well, this relates to personal relationships, agency relationships with the client. It is confidential in that these are matters really belonging to principals other than ourselves.
>
> And, we think that we, in effect, would be not only violating that fiduciary, but at the same time making available information that might be used detrimentally; it would be

possibly advantageous to our competitors and people who might welcome that information.

And it has never been generally given.

It has been the policy of our company not to give this information. And it has been a policy for many years.

Q. Does that adequately state your position, sir?

A. Yes.

The hearing examiner denied the claim that the information should be received in confidence as "without merit" (R. 38).

Respondents appealed to the Commission, which, on January 25, 1961, affirmed the examiner and ordered respondents to appear, testify and produce the material sought by the subpoena at a reconvened public hearing (R. 17–18). It explained its earlier conclusion that "public proceedings should be the rule" on the ground that the subject matter of the inquiry was of concern to Congress, to station licensees, and to other segments of the industry and the public (R. 11). The processes involved in the production, sale and distribution of television programming were, according to the Commission, "complex and generally unknown" (R. 10). To insure intelligent assessment of the information obtained in this area, it concluded that it would be "highly desirable" that the facts, information, data and opinion supplied by one group or individual should be known to other interested groups and individuals so that they might "verify, refute, explain, amplify or supplement the record from their own diverse points of view" (R. 11). The

Commission also held that the hearing examiner could proceed *in camera* if it were demonstarted that public disclosure would irreparably damage private competitive interests and if such injury outweighed the considerations favoring open hearings (R. 11, 18). The Commission found, however, that the claim in this case that disclosure of the information sought would bring competitive harm to respondents was "totally unsupported by their pleadings and contrary to the record" (R. 13). The Commission went on to note (pp. 13–14):

> None of the information sought by the subpoenas now outstanding is detailed financial information of the sort involved in *FCC* v. *Cohn, et al.*, 154 F. Supp. 899 (D. Ct., S.D. N.Y.). Moreover, it appears that information and testimony of exactly the same kind and type as that now offered as "confidential" by MCA was produced by witnesses for William Morris and other competitors of MCA without question as to its inclusion in the public record. Evidence similar to that sought from the other petitioners was freely given by another person engaged in a similar business. It appears further that, in eliciting testimony and requesting data from such other persons, the Presiding Officer and Commission counsel have made every effort to avoid public disclosure of detailed internal financial information or detailed contractual arrangements which might in fact irreparably harm private interests without sufficient compensating benefit to the public. We concur in the Presiding Officer's finding on this record that there is nothing of a confidential

nature in the matters sought to be elicited from these petitioners which would require that their testimony be made part of the non-public docket.

The Commission thereupon ordered that the information be produced in a public hearing except to the extent that the hearing examiner should order otherwise (R. 13, 17–18). When the hearing reconvened, respondents persisted in their refusal to comply with the subpoena and the Commission's order (R. 46–48).

2. *Judicial proceedings.*—The Commission thereupon petitioned the district court for the enforcement of its subpoena and orders.[6] In opposing the Commission's petition, respondents contended, *inter alia*, that the Commission erred in refusing to receive the testimony and documents in confidence (R. 101). After hearing argument, the district court ordered respondents to appear at a reconvened hearing to testify and to produce the material sought by the subpoena (R. 129). But on the basis of the "record herein," the court found that "in protection of respondents' rights and to preclude disclosure of trade secrets of which competitors might take advantage" it was necessary that "all further testimony" of respondents be taken in confidence (R. 125). It thereupon ordered the examiner and the Commission to hold confidential all information submitted unless and until the Commission, in an adversary proceeding, demon-

[6] See Sections 401(a), 401(b), 409(f) and 409(g) of the Communications Act of 1934, as amended, 47 U.S.C. 401(a), 401(b), 409(f) and 409(g), (R. 1–5).

strated to the court "good cause" for making the testimony and documents public (R. 129).

On appeal, a majority of the court of appeals affirmed the portion of the district court's order which pertains to the questions now before this Court.[1] The majority held that the district court had discretion to determine on its own the need for confidential treatment of evidence to be presented to the Commission, and that the court had not abused its discretion in this regard (R. 144). Judge Browning dissented. He said that the determination whether the subpoenaed information should be kept confidential should have been left to the discretion of the Commission. It was his view that the district court might require confidentiality only if the Commission's refusal to accord confidential treatment to MCA's

[1] Certain other issues were presented to the court of appeals which are no longer in the case. The Commission appealed from that portion of the district court's order permitting counsel for respondents to object to questions by the Commission, and to present, on the record, concise grounds and reasons for such objections. This issue was rendered moot by the Commission's amendment to Part I of its Rules and Regulations on September 2, 1964. 29 F.R. 12774–12775 (Sept. 10, 1964). Witnesses compelled to appear at any Commission proceeding are now accorded the right to have their counsel "make objections on the record, and to state briefly the basis for such objections, in connection with any examination of his client." See our Petition for a Writ of Certiorari in this case, Appendix E, p. 64, for the complete text of this amendment.

Respondents also contended that the Commission had failed to comply with the requirement of Section 3(a) of the Administrative Procedure Act, 5 U.S.C. 1002(a), regarding the promulgation of procedural rules to cover administrative proceedings. The court of appeals rejected that claim, and respondents have not sought this Court's review of that issue.

documents and to Schreiber's testimony could be deemed to constitute an abuse of the Commission's discretion. Judge Browning also agreed with the Commission's position that the burden of proof in this case rested with the party who opposed the public proceeding (R. 158). The Commission's petition for rehearing *en banc* was denied (R. 172–176, 177).

ARGUMENT

Introduction and Summary

In affirming the order of the district court insofar as it relates to the confidentiality issue which is before this Court, the court of appeals erred in two respects.

First, it sanctioned the district court's substitution of its own discretion for the discretion exercised initially by the Federal Communications Commission. As we demonstrate below, the determination whether or not to receive testimony or other evidence relevant to an investigatory hearing *in camera* has been committed by Congress primarily to the Commission, and a district court may upset the Commission's decision only if it is satisfied that the Commission has abused its discretion. An appellate court must similarly decide whether the exercise of discretion *by the Commission* was within permissible limits. The court of appeals misapprehended this standard when it made the case turn on whether the district court, and not the Commission, had abused its discretion.

Second, the court of appeals erred in failing to accord sufficient weight to the strong policies favoring

public disclosure of investigatory proceedings conducted by the Federal Communications Commission. In a proceeding such as the one involved in this case, there are sound reasons of policy warranting full public access to evidence produced during the inquiry. Hence, in the absence of any agency rule to the contrary, the burden was on the party requesting secrecy to establish that his circumstances warranted an exception to the usual rule.

I

THE FEDERAL COMMUNICATIONS COMMISSION HAS DISCRETION TO DETERMINE WHETHER EVIDENCE SUBPOENAED FOR AN INVESTIGATORY HEARING SHOULD BE RECEIVED IN CAMERA OR IN PUBLIC

Section 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. 154(j), empowers the Federal Communications Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." This Court has interpreted this provision as "explicitly and by implication [leaving] to the Commission's own devising" the "subordinate questions of procedure * * * [such as] the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions * * *." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138. In *Federal Communications Commission* v. *WJR*, 337 U.S. 265, 282, the Court observed that the Act "left largely to [the

Commission's] judgment the determination of the manner of conducting its business which would most fairly and reasonably accommodate [the ends of justice]." This sweeping authorization was not subsequently limited by applicable provisions of the Administrative Procedure Act, 5 U.S.C. 1001, *et seq.*, and hence it made the Commission the principal master of its own proceedings.

The broad authority vested in the Commission in this regard was, as the Court observed in the *Pottsville Broadcasting* case, a specific application of the established principle that administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." 309 U.S. at 143. Subsequent decisions have reaffirmed the principle in a variety of applications, and it is rooted in sound policy judgments. See *Civil Aeronautics Board* v. *Hermann,* 353 U.S. 322; *Oklahoma Press Pub. Co.* v. *Walling,* 327 U.S. 186, 216; *Wallace Corp.* v. *National Labor Relations Board,* 323 U.S. 248, 253; *Endicott Johnson Corp* v. *Perkins,* 317 U.S. 501, 509. Agencies and administrators are presumed to be familiar with the industries which they regulate, and they are in far better position than courts to design procedural rules adapted to the peculiarities of those industries. Such rules should be reviewable only for abuse of discretion or for inconsistency with some particular governing statute. A standard of review which would permit district courts to decide questions of administrative procedure *de novo* would

substitute for the informed expert judgment of an agency a determination based upon far less familiarity and experience with the industry than the agency possesses.

The particular issue around which this case revolves—whether respondents' evidence, subpoenaed for an investigatory hearing, should be received in public session or *in camera*—is precisely the sort of procedural question which should be left primarily to the discretion of the agency. Resolution of that issue turns on an assessment of the value to the investigation of public disclosure of respondents' information and of the harm likely to be suffered by respondents as a result of such disclosure. The Commission, which is conducting the investigation and is acquainted with the facts which most require public attention and verification, is better suited for the task of weighing the need for public disclosure than is a court. And, since the Commission is in day-to-day touch with the industry and is more familiar with its competitive features than a court, it is more qualified than a district judge to evaluate the competitive impact which might result from public disclosure of the subpoenaed evidence. Respondents are adequately protected against arbitrary or otherwise improper rulings in this regard by their right to have the Commission's rules modified if its terms amount to an abuse of the agency's discretion.

Moreover, the Commission's discretion here is entitled to even greater weight because this case involves an investigatory hearing rather than adjudica-

tion. The purpose of the Commission's inquiry was to inform both the Commission and Congress of the practices involved in radio and television network broadcasting—an industry which had experienced phenomenal growth in the preceding decade and which was exercising considerable influence on contemporary American society. In executing this fact-finding function, the Commission was entitled to broader latitude in its procedural rulings than if it were engaged in an adjudicative capacity. See *Hannah* v. *Larche,* 363 U.S. 420, 443–451. Restrictive judicial limitations on the power of the agency to proceed in any manner it reasonably believed necessary in order to gather information "would make a shambles of the investigation and stifle the agency in its gathering of facts." 363 U.S. at 444.

The recognized power of an administrative agency to determine whether to proceed in an investigation publicly or privately is illustrated by this Court's decision in *Norwegian Nitrogen Co.* v. *United States,* 288 U.S. 294. In that case, the validity of a Presidential Proclamation was challenged on the ground that the Tariff Commission had not afforded the hearing prescribed by statute because it had failed to disclose certain cost information received under a pledge of secrecy.[8] This Court held that the Com-

[8] The statute there applicable, Section 315(c) of the Tariff Act of 1922, 42 Stat. 941, 942–943, which the Court quoted, was similar to Section 4(j) of the Communications Act of 1934 in that it provided that the Tariff Commission was "authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary."

mission's hearing met the required standards of fairness notwithstanding the non-disclosure (288 U.S. at 321–322):

> If [the Tariff Commission] was under a duty to give the kind of hearing that was fair in all circumstances, it was free to shape its course within reasonable limits by its own conception of the promptings of policy and fairness. It would have kept within the statute even though it had made the hearings private and had refrained from the publication of anything, either the records of its agents or the testimony of witnesses * * *. Instead, it made the hearings public, and exposed everything to view except only when publication was likely in its judgment to result in hardship or injustice. * * *

The ruling sustained in the *Norwegian Nitrogen* case imposed confidentiality on certain information rather than requiring its public disclosure. See also *Bowles* v. *Baer*, 142 F. 2d 787 (C.A. 7) *Woolley v. United States*, 97 F. 2d 258 (C.A. 9), certiorari denied, 305 U.S. 614. But the same principle applies to an investigating agency's decision that publicity rather than secrecy be the rule.[9] In *American Sumatra Tobacco*

[9] Compare *Yellin* v. *United States*, 374 U.S. 109, which involved a Congressional investigating committee's failure to pass upon a witness' request for *in camera* proceedings. Executive session was authorized by the committee's own rules, and the Court noted that the committee might have "in its discretion * * * decide[d] thereafter to hold a public hearing." 374 U.S. at 118.

Corp v. *Securities and Exchange Commission*, 110 F. 2d 117 (C.A. D.C.), the issue was whether the agency could be required to receive a certain financial statement in confidence. In sustaining the Commission's refusal to accord confidential status to the information, the court said (110 F. 2d at 120):

> [U]nquestionably Congress, in giving a registrant the right to file objection to publication and in authorizing the Commission to grant or refuse the request in the exercise of a sound judicial discretion, imposed on the Commission the duty of considering the claimed danger of loss and damage and of weighing it in the scale of public interest. And this, at least, is what the Commission has attempted to do and, if the conclusion reached is just as likely to be correct as incorrect, it is our duty to let it stand.

Recognizing that the company might have legitimate apprehensions as to the consequences of disclosure, the court nevertheless viewed its own role as limited to policing the agency's discretion (*ibid.*; emphasis supplied):

> [I]f the question were before us an an original proposition, we could easily see our way to sustaining the objections to general publication. *But the question is primarily not for us but for the Commission,* and Congress unquestionably intended that the Commission should bring to bear upon the decision of this and like questions, what has been called in cases within the jurisdiction of the Interstate Commerce Commission, the knowledge and experience of experts. This does not by any means set up

> an inquisition destructive of the rights of the individual. The delegated power is not to be exercised arbitrarily or to be considered an unfettered discretion over the property of the citizen. Its exercise is subject to review. But so long as the Commission's decision rests on substantial evidence and on inferences which are not arbitrary and capricious, it should be sustained. * * *

It appears to follow *a fortiori* from the *American Sumatra* decision that the Federal Communications Commission has discretion to require the public disclosure of information within its investigatory jurisdiction. For the agency involved in *American Sumatra*—the Securities and Exchange Commission—was empowered by statute to make filed documents public "only when in its judgment a disclosure of such information is in the public interest." Section 24(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78x(b). In other words, under the Securities Exchange Act the Commission has the burden of demonstrating that public disclosure of information submitted with a request for secrecy is "in the public interest." In the case of the Federal Communications Commission, on the other hand, the general rule favors disclosure (see pp. 28, 30, *infra*), and there is no provision in the Communications Act analogous to Section 24(b) of the Securities Exchange Act.

Nor is the *American Sumatra* decision distinguishable for any of the reasons suggested by respondents (Br. in Op., pp. 11–12). The fact that the Communications Act does not authorize a procedure

whereby information may be filed confidentially and then disclosed after the Commission considers whether or not it should be made public has no bearing on the standard by which the agency's determination should be judicially reviewed. If, as here, the demand is for specific information—*i.e.*, "[a] list of * * * television programs" defined with particularity—the agency is as fully able to exercise a discretionary judgment regarding confidentiality as if the information were preliminarily submitted to it *in camera*.[10] Nor is there any distinction between this case and *American Sumatra* on the ground that the Securities Exchange Act's "regulatory scheme * * * [rel]ies primarily upon a disclosure concept" (Br. in Op., p. 11). As we demonstrate below (pp. 28, 30, *infra*), investigatory hearings by the Federal Communications Commission depend, at least to the same degree, on "a disclosure concept." And, finally, the fact that respondents here are not subject to regulation by the Commission is a distinction without a difference. In an investigatory hearing, regulation is not an issue; the only relevant question is whether the witness has evidence which would assist the inquiry. Respondents here obviously have such information, and whether or not they are subject to the Commission's regulatory powers, their information must be produced upon a reasonable and lawful

[10] If the demand is so broad that there is no way for the agency to pass on the confidentiality request without first examining the documents, it might well be an abuse of discretion for it to compel public production without prior *in camera* inspection and judicial review of an adverse determination.

demand by the Commission. Any other rule would produce the anomalous result that the Commission could, in an investigatory proceeding, more freely render procedural rulings against witnesses subject to its regulation than against witnesses who are beyond its regulatory powers.

The limited scope of judicial review over rulings such as those in this case and in *American Sumatra* has been noted in other decisions.[11] The rule adopted by these cases is based on the general principle, discussed above, that within the bounds of fair and reasonable procedures, administrative agencies should be left free to conduct investigations in such manner as they deem most conducive to the orderly and efficient execution of their responsibilities. In conducting an investigation, an administrative agency

[11] See *American Sumatra Tobacco Corp.* v. *Securities and Exchange Commission*, 93 F. 2d 236, 239 (C.A. D.C.): "[T]he discretion committed to the Commission, as to the determination of public interest and as to the question whether or not trade secrets or processes are involved, is a judicial discretion and requires the exercise of judgment"; *E. Griffiths Hughes, Inc.* v. *Federal Trade Commission*, 63 F. 2d 362, 364 (C.A. D.C.): "Doubtless on such a hearing as is here provided the Commission has discretion, on a showing that such a hearing would disclose trade secrets or other data in itself destructive of the business under investigation, to do whatever is proper and necessary to avoid these consequences"; *Securities and Exchange Commission* v. *Harrison*, 80 F. Supp. 226, 229 (D.D.C.): "It is a well recognized principle of administrative law that investigations ought to be so conducted that harmful publicity will not be used in lieu of sanctions provided by law, but it must rest in the sound discretion of the agency created by the Congress, and not with the courts, to determine when investigations are to be conducted by open or closed hearing." See, generally, Forkosch, *Administrative Law* (1956), p. 313.

must make a multitude of choices as to how to proceed. It should be free to act on those choices except if it can it can be shown that it has acted arbitrarily or capriciously or if it exceeds some specific statutory limitation.

For this reason, it is no answer to say, as respondents do, that the district court's order demonstrated a "sensible approach" to the problem (Br. in Op., p. 8). The district court had no authority to formulate its own approach; it could reject the Commission's decision only if that decision were arbitrary or if it violated some statutory rule.[12]

Respondents do not claim—nor could they—that the rejection of their request for secrecy violated the Administrative Procedure Act or any other applicable statute. Indeed, the Administrative Procedure Act itself encourages disclosure (p. 28, *infra*), and it contains no provision limiting the Commission's discretion to deal with this question. Consequently, we submit that there is no basis for suggesting that the Commission exceeded its authority.

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[12] Respondents cite cases in which subpoenas by administrative agencies were modified by district courts in order to require the subpoenaed matter to be held confidential (Br. in Op., p. 12). But in none of those cases was there any issue as to the standard by which the agency's exercise of discretion should be reviewed, nor was there any challenge by the agency to the court's authority to modify the subpoena.

II

THE COMMISSION PROPERLY PLACED THE BURDEN ON RESPONDENTS TO ESTABLISH THAT THE USUAL PUBLIC PROCEEDING OUGHT NOT BE HELD

The Commission rejected respondent's request for confidentiality on the ground that "public proceedings should be the rule," and that exceptions to that rule should be granted "only in those extraordinary instances where disclosure would irreparably damage private, competitive interests and where such interests could be found by the Presiding Officer to outweigh the paramount interest of the public and the Commission in full public disclosure" (R. 11). Establishing this presumption in favor of public proceedings was a reasonable exercise of the Commission's procedural rule-making authority, and it accorded with the general public policy strongly favoring disclosure of agency and court proceedings.

It is "the fundamental policy of free societies that justice is usually promoted by disclosure rather than secrecy." *Boeing Airplane Co.* v. *Coggeshall,* 280 F. 2d 654, 662 (C.A. D.C.). The reasons underlying this policy's application in judicial proceedings are elaborated in 6 Wigmore, *Evidence* (1940), § 1834, and on that policy rests Rule 43(a) of the Federal Rules of Civil Procedure, which provides that "the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules."

Recognizing the presumption in favor of public disclosure with respect to proceedings before administrative agencies, Congress provided in Section 3(c) of the Administrative Procedure Act, 5 U.S.C. 1002(c), that:

> Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

This statute has been interpreted to apply to "pleadings, transcripts of testimony, exhibits, and all documents received in evidence or made a part of the record" in any "formal proceedings." Attorney General's Manual on the Administrative Procedure Act (1947), p. 24. And in *Graber Mfg. Co.* v. *Dixon*, 223 F. Supp. 1020, 1022 (D.D.C.), the court said, "Of course, the public interest in open hearings places the burden on the plaintiffs to show that their documents should be received in confidence." See, also, Report of the Attorney General's Committee on Administrative Procedure (1941), p. 68; 1 Davis, *Administrative Law Treatise* (1958), p. 553.

The Communications Act of 1934 itself reflects this policy in the provision of Section 4(j), 47 U.S.C. 154(j) which states, "Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested." This consistent view certainly warranted the Commission's adoption of a rule placing

on the proponent of any request for secrecy the burden of demonstrating that secrecy is warranted. Such a rule is consistent with the allocation of the burden of proof in a judicial proceeding: "[A] person claiming that he needs to keep these things [business secrets] secret at all should be expected to make the exigency particularly plain." 8 Wigmore, *Evidence* (McNaughton Rev. 1961), § 2212, p. 156.[13] See, also, 49 U.S.C. 1504 (Federal Aviation Act); Atomic Energy Commission, Rules of Practice, 10 C.F.R. § 2.790(b); *H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184.

Moreover, in this particular case disclosure was especially important. By making public the information received from any of its witnesses, the Commission hoped to stimulate other interested groups and individuals to come forward and "verify, refute, explain, amplify or supplement the record from their own diverse points of view" (R. 11). In this way the Commission expected to build a full and complete public record upon which it and Congress might act. This public record would serve the dual function of

[13] In accord with these views are those of Viscount Haldane, Lord Chancellor, who said in *Scott* v. *Scott* (1913) A.C. 417, 437–438 (House of Lords) (emphasis supplied):

> It may often be necessary, in order to attain its primary object, that the Court should exclude the public. * * * As the paramount object must always be to do justice, the general rule as to publicity * * * must accordingly yield. *But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration.* * * *

informing the broadcasting industry of the factual basis supporting any regulatory actions which the Commission might ultimately take (R. 10) and providing information for future legislation.

In addition, public disclosure was necessary for the execution of the Commission's duty under Section 4(k) of the Communications Act of 1934, as amended, 47 U.S.C. 154(k), to make an annual report to Congress concerning, *inter alia*, such information and data collected during the preceding year "as may be considered of value in the determination of questions connected with the regulation of * * * radio communication and radio transmission of energy * * *."[14] Indeed, this very investigation was specially authorized by Congress so that Congress might "draw upon the facts which are obtained," as Senator Magnuson advised the Senate. See p. 7, *supra;* 101 Cong. Rec. 7629.

It appears quite clear, therefore, that compelling reasons dictated open and public proceedings in this case. Even so, the Commission recognized that extraordinary circumstances might warrant the receipt of testimony and documents in non-public sessions. Private proceedings were therefore authorized "to the extent that the public interest, the proper dispatch of the business of said proceding, or the ends of justice will be served thereby" (R. 22). But the Commission chose to place the burden on the proponent of confidentiality to demonstrate the need for non-public sessions. And it followed the accepted rule that this

[14] Wide distribution of copies of this annual report is authorized. 47 U.S.C. 154(k).

burden could not be met merely by an assertion that disclosure could inconvenience the witness (R. 11).[15] Consequently, this procedural ruling provided adequate protection for legitimate claims of confidentiality by permitting private sessions whenever the damage resulting from disclosure would outweigh the need for public knowledge of subpoenaed evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals be modified so as to strike paragraph 2 of the district court's order, and that the district court be directed to enforce the Commission's order and subpoena without qualification.[16]

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FEBRUARY 1965.

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[15] Cf. *United States* v. *Purdome*, 30 F.R.D. 338 (W.D. Mo.); *Sacks* v. *Frank H. Lee Co.*, 18 F.R.D. 500 (S.D.N.Y.).

[16] We believe that it is plain, on this record, that the Commission did not abuse its discretion. But if the Court is of the view that that question is still open, the judgment should be reversed and the case remanded to the district court for judicial review under the appropriate standard.

U.S. GOVERNMENT PRINTING OFFICE : 1965

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National Labor Relations Board v. *Anchor Rome Mills*, 197 F. 2d 447 (5th Cir. 1952) 31
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Savannah River Electric Co. v. *Federal Power Commission*, 164 F. 2d 408 (4th Cir. 1947) 3
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474 (1951) 35
Walling v. *American Rolbal Corporation*, 135 F. 2d 1003 (2nd Cir. 1943) 30
Wanderer v. *Kaplan*, 1962 Trade Cas. Paragraph 70,462 (D.C.D.C. Civil Action No. 2819-62) 19

STATUTES:

Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001, *et seq.*:

Sec. 6(a) 18, 22

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*:

Sec. 409(g) 27
Sec. 409(m) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 482

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*

v.

TAFT B. SCHREIBER and MCA INC.

BRIEF FOR RESPONDENTS TAFT B. SCHREIBER AND MCA INC.

QUESTION PRESENTED

Where the record evinces the intention of the Federal Communications Commission during an investigatory hearing to probe deeply into the activities and operations of respondent MCA, a company which is engaged in a highly competitive industry and one in which trade secrets are of great importance and which company is not subject to the regulatory jurisdiction of the Commission, did the court of appeals err in refusing to reverse the district court order (made after a thorough review of the voluminous record) which required that all further information elicited from re-

spondents be held in confidence until the interrogation of respondents had been completed and the questions and answers could be placed before the district court in the context of the then existing record, at which time the district court would entertain a motion by the Commission to permit the disclosure of the information so elicited.

INCLUSION OF APPENDIX

An Appendix has been included in this brief. In designating the parts of the transcript of testimony before the Commission to be reproduced in the printed record, the Commission omitted parts of the testimony of Mr. Schreiber (and related colloquy between respondents' counsel on the one hand and the Hearing Examiner and the Commission's counsel on the other), which took place on October 21, 1960. When respondents designated the portions of the transcript which the respondents felt should be included in the printed record, the portions so designated by respondents were unfortunately not inserted in the appropriate places in the printed record; therefore, the printed record does not present an uninterrupted flow of the aforementioned testimony as it appears in the transcript. Part One of the Appendix brings together in one place these disjointed parts of the printed record, so that the testimony as set forth in Part One of the Appendix reads exactly as it does in the transcript. Citations to the Appendix utilize the abbreviation "A". Page references to the printed record where the particular testimony appears, as well as to the pages and lines of the transcript are inserted in appropriate places in Part One of the Appendix. Citations to the transcript are abbreviated "Tr.".

Hearings conducted in Washington, D. C., in the same proceeding (i.e., F.C.C. Docket No. 12782) from January 23, 1962, to February 6, 1962, contain material which was called to the attention of the district court [pages 259-261 of the record before the court of appeals], prior to the filing of its order in the instant case.[1]

These hearings are reported in Volume 55 through 62 of the transcript of the testimony (i.e., the Official Report of Proceedings before the Federal Communications Commission in Docket No. 12782), and excerpts from these volumes, which are referred to in other portions of this brief, are included in Part Two of the Appendix.

STATEMENT

Taft B. Schreiber is Vice-President of MCA Inc. and President of Revue Studios, a division of MCA. MCA engages in the production of filmed television shows and leases studio facilities to other producers. MCA (primarily through subsidiaries) also distrib-

[1] Although those hearings took place subsequent to the rendition of the district court's opinion and accordingly the record could not have been placed in evidence, the record was properly considered by the district court in framing its order and may be considered by this Court by an exercise of judicial notice.

In *Savannah River Electric Co.* v. *Federal Power Commission*, 164 F. 2d 408, 410 (4th Cir. 1947), the court stated: "While these matters occurred after the hearing before the Commission, all are matters of public record of which we can take judicial notice, except the condemnation suits, which are admitted in briefs of counsel."

See also, *Greeson* v. *Imperial Irr. Dist.*, 59 F. 2d 529, 531 (9th Cir. 1932).

The Solicitor General, by letter dated January 13, 1965, states that he will enter no objection to our request that the Court take judicial notice of the aforementioned matters.

utes television shows to networks and television stations.

At the time of the Commission's hearings, in 1960, MCA represented, as a talent agent, artists and production companies in various branches of the entertainment industry, but since July 1962, MCA has no longer been engaged in this phase of its business. There is no dispute that there is now, and has been for many years, vigorous competition in each of the fields in which MCA is now and has been active. Trade secrets are of considerable importance to success in MCA's business. MCA owns no television or radio stations and neither it, nor any of its subsidiaries or related companies, is a licensee of, or subject to, regulation by the Federal Communications Commission.

The present controversy between respondents and the Commission arises out of a broad Commission investigation of the television industry. The investigation has been under way for a number of years and under various directives. The present inquiry stems from an Order of the Commission released on February 27, 1959, FCC 59-166 [R. 20], which directed an inquiry into the "policies and practices pursued by the networks and others in the acquisition, ownership, production, distribution, selection, sale and licensing of programs for television exhibition" [R. 21]. This Order was supplemented by a Commission Order released on November 10, 1959, FCC 59-1136 [R. 25], which directed that the inquiry be enlarged to embrace "policies, practices, mechanics and surveillance pursued and carried out by networks, station licensees and others in connection with the acquisition, ownership, production, distribution, selection, sale and licensing

of programs for radio and television exhibition . . . ." [R. 27].

On October 10, 1960, the Commission, through its Hearing Examiner, convened hearings in Los Angeles On the first morning of the hearings in Los Angeles, the Hearing Examiner announced the so-called "ground rules"—the procedure which he planned to follow during the course of the hearing, as follows [R. 75-76]:

> The full authority of the Commission, within the limits of its order, has been delegated to me as presiding officer, pursuant to Section 5(d) of the Communications Act.
>
> Subject only to review by the Commission in certain instances, for purposes of this proceeding the presiding officer is clothed with the full powers of the Commission itself.
>
> Additionally, I should point out that, notwithstanding some similarity in procedure, this proceeding is not a hearing in the usual sense—that is, it is not judicial in nature—but, as indicated, it is investigatory or fact finding. There are no parties, as such, no litigating parties, and the procedural rules usual to quasi-judicial administrative cases do not apply in their entirety. In other words, the objective of this proceeding is to ascertain facts and make an official record thereof for use by the Commission in performing its functions under the Communications Act.
>
> Those who give testimony appear as witnesses for the Commission. Counsel will request their appearances, or, if necessary, they will be summoned to appear by process issued by the presiding officer.

> While no persons, other than the Commission representatives, may directly participate in the proceeding, any witness will, of course, be permitted to be accompanied by, and to consult with, counsel, if he so desires.

As the hearing progressed, the restrictive nature of the ground rules soon became apparent. One aspect of the ground rules was that counsel for a witness would not be allowed to make any objection. This was shown by several incidents which occurred prior to Mr. Schreiber being called, the first of which arose when Mr. Douglas A. Anello, counsel for a witness sought to state an objection [R. 85-86]:

> Mr. Anello: Mr. Examiner, I don't think—
>
> Chief Hearing Examiner: I am sorry, I can't hear you, sir.
>
> You are at liberty to consult the witness in consultation. I will not hear arguments, nor will I hear objection from counsel.
>
> We have no parties here, as such.
>
> Mr. Bryant: Do you wish to consult with your counsel?
>
> Mr. Morris: May I?
>
> Chief Hearing Examiner: Yes.
>
> Mr. Morris: Thank you.
>
> (The witness consults with counsel.)

A similar incident took place when Commission Counsel, Ashbrook P. Bryant, attempted to elicit a witness' interpretation of an agreement between MCA and a guild representing artists in the entertainment industry [R. 84-85]:

> [Mr. Bryant, continuing:]
>
> Now, as a matter of fact, by this letter, Mr. Kenyon, did the Guild not bind itself apparently in perpetuity not to make any regulation which

would result in preventing MCA from continuing both as a producer of television film and a talent agency representing the members of your organization?

Mr. Taback [Counsel for witness]: Excuse me. At this point I think I would have to object.

Mr. Bryant: Just a moment, sir.

Chief Hearing Examiner: I don't know whether you were here, sir, when we laid down the ground rules of the proceeding?

Mr. Taback: I am sorry, I was not, your Honor.

Chief Hearing Examiner: Counsel will not be heard from directly, there being no parties as such, or litigants in this case.

However, counsel is at liberty to consult with the witness, his client, if the witness so desires.

We will proceed on that basis.

The Witness: On that basis, your Honor, I would like to consult.

Chief Hearing Examiner: Very well.

The Witness: Mr. Bryant, speaking as a laymen, I just don't believe I can answer that. It is obviously a legal question.

Chief Hearing Examiner: Mr. Bryant, I wonder if the witness understands what is meant by the question.

Mr. Bryant: Yes, sir. I don't think it calls for a legal conclusion.

I think it is a simply a matter of your understanding of what this document was intended to so. [sic] And wasn't that precisely it? Wasn't this part of the negotiations and your understanding when this document was prepared and sent to MCA?

Mr. Kenyon: Well, not entirely.

Since the ground rules precluded counsel from making an objection, the only way in which counsel could prevent his client from answering a question was to initiate advice to his client, or wait until his client

asked for advice. However, the Hearing Examiner announced that his ground rules required that the Hearing Examiner's permission be obtained before a witness could consult with counsel [R. 76]:

> Chief Hearing Examiner: Mr. Bryant—when a witness desires to consult with his counsel, he must make that desire known on the record, and the Presiding Officer will rule. Do you understand, Mr. Orr?
>
> The Witness: Yes, sir.
>
> Chief Hearing Examiner: No information shall be volunteered by counsel without permission. I am suggesting no impropriety so far, but I want to make that clear.
>
> The Witness: Do I ask you, Your Honor?
>
> Chief Hearing Examiner: Just announce it on the record, and I will rule.
>
> Proceed.
>
> By Mr. Bryant:
>
> Q. I believe we were at the Roaring Twenties.
>
> A. I would like to check with my counsel.
>
> Chief Hearing Examiner: Any objection, sir?
>
> Mr. Bryant: None, sir.
>
> Chief Hearing Examiner: It may be done.

Having announced the requirement that permission must be obtained before a witness could consult with counsel, the Hearing Examiner arrogated to himself the right to refuse permission [R. 86]:

> Chief Hearing Examiner: May I interrupt you, sir.
>
> Let me ask you whether you are satisfied that, generally speaking, television programs are not having adverse effects on any segments of the population, particularly teenagers?
>
> Mr. Morris [Witness]: I don't consider myself qualified to answer that question, sir.

Chief Hearing Examiner: Have you given it any thought, sir, in connection with your work? I assume you must have.

Mr. Morris: Yes, a very great deal.

Chief Hearing Examiner: You have no view to give the Commission in that behalf?

Mr. Morris: May I consult with counsel?

Chief Hearing Examiner: I see no reason why counsel should be consulted on a thing of this kind. There is no legal question presented. You have reviewed, over a period of 14 months, some 300 plays being produced and readied for consumption by the public.

Now, you must have some views, you must have given it thought considerable time. What do you say here now—without consulting counsel? You don't need the advice of counsel to answer a question like that.

Prior to Mr. Schreiber taking the witness stand, numerous questions were put to witnesses concerning their competitive and other relationships with MCA. For example, a Warner Brothers executive was asked if his company's decision to develop its own talent was based in part upon MCA's activities (the witness' response was negative [R. 77]); an executive of Screen Gems (a subsidiary of Columbia Pictures) was asked whether Screen Gems had been able to obtain stars and other top creative people who were represented by MCA, and whether Screen Gems had paid higher prices for such talent than MCA had paid as a producer (the witness' response was that MCA's being in several activities had not constituted a hindrance to obtaining top talent and that Screen Gems was able to obtain top talent for the same prices paid by MCA) [R. 78-79]; an independent producer was asked if he had found it difficult to obtain talent because of MCA's activities

(the witness' reply was negative) [R. 82-83]. See also R. 79-82.

Such pointed questions were not asked about any other company in the industry, not even about the networks themselves whose practices were ostensibly the main thrust of the inquiry. The guilds and labor organizations which represent persons working in the industry were also questioned closely about their relationship to MCA. Again, concentration on MCA was unique. Also, before Schreiber took the witness stand, counsel for the Commission introduced into evidence as Exhibits number LA 237 and 238 [R. 49 and R. 69, respectively], detailed financial and corporate data concerning MCA, gleaned from the files of the Securities and Exchange Commission and from a financial publication. Respondents are unaware of any other occasion during the hearing when even remotely comparable material pertaining to other companies in the industry was placed in the public record, by the Commission or by independent witnesses.

The attention of the district court was also called [Pages 259-261 of the record before the court of appeals] to hearings conducted by the Commission in Washington, D. C. in the same proceeding (i.e., F.C.C. Docket No. 12782) from January 23, 1962, to February 6, 1962 (which was after the district court filed its memorandum decision but before the filing of its order) in which officials of the major television networks were interrogated in detail with respect to their business dealings with MCA. For example, one of the CBS officials was questioned at length regarding representation by MCA as agent for the Ed Sullivan Show, with obvious (albeit unsuccessful) attempts on the

part of the Commission to have the witness characterize MCA's efforts as being improper [Tr. 8495-8498; A. 9a-11a]. The Board Chairman of National Broadcasting Company, Mr. Robert Sarnoff, was asked whether MCA had been given preferential treatment in the sale of its shows to the networks, as reported in various magazine articles [Tr. 8771-8779; A. 11a-17a]. Mr. Sarnoff categorically denied this. Persistent efforts were made to try to cause the network witnesses, usually by leading questions of the most glaring kind, to testify that MCA used improper tactics or tried to achieve improper benefits [e.g., Tr. 9068-9077; A. 18a-24a]. The network officials were asked about the number of MCA-represented programs and the breakdown of MCA-companies [Tr. 9081-9082; A. 25a]. Financial data regarding MCA's gross income was read into the record [Tr. 9149-9151; A. 26a-27a]. In the light of the entire record, it had become patently clear that the Commission was seeking to delve more deeply into the business activities of MCA than of any other witness.

On the morning of October 21, 1960, in response to a subpoena duces tecum, Mr. Schreiber appeared and brought with him several lists called for by the subpoena. Mr. Schreiber was accompanied by his counsel, Mr. Allen E. Susman. On request of Commission Counsel, Mr. Schreiber readily produced the list specified in Annex A to the subpoena.

Mr. Schreiber then testified that he had the information called for by Annex B and stated "We will be happy to produce it on the basis of its being kept confidential." [A. 1a].

Commission Counsel proceeded to interrogate Mr. Schreiber as to why he believed the material should be

kept confidential. In reply Mr. Schreiber stated [A. 2a]:

> A. Well, this relates to personal relationships, agency relationships with the client. It is confidential in that these are matters really belonging to principals other than ourselves.
>
> And we think that we, in effect, would be not only violating that fiduciary [sic] but at the same time making available information that might be used detrimentally; it would be possibly advantageous to our competitors and people who might welcome that information.
>
> And it has never been generally given.
>
> It has been the policy of our company not to give this information. And it has been a policy for many years.

Commission Counsel was not satisfied with Mr. Schreiber's answer and proceeded to argue with Mr. Schreiber as to the justification and reasons for the confidentiality.

When Mr. Susman asked to be heard as counsel for the witness on the questions raised, the following transpired [A. 4a-6a]:

> Mr. Susman: Just a moment, Mr. Schreiber. I would like to be heard on this.
>
> Chief Hearing Examiner: I am sorry, sir. The ground rules, as you may or may not be aware of—
>
> Mr. Susman: I am aware of what has transpired with counsel in this proceeding, your Honor, but I don't quite agree with the concept of what the ground rules are. But, be that as it may, I think we are getting into an area now where Mr. Mr. Schreiber, who is not a lawyer, is not really in a position to be answering questions of this nature.
>
> Chief Hearing Examiner: I am sorry. I believe I cannot hear you at all. Will you strike counsel's—
>
> Mr. Bryant: Would it help if I—

Chief Hearing Examiner: Strike counsel's statement from the record.

He is at liberty, if he wishes, to consult with his client on the stand at any time, and, likewise, he is a liberty to consult with counsel for the network study office.

But I cannot hear argument of counsel—only statements of the witness, who will reflect the views of counsel whenever he desires to do so.

Mr. Bryant: Well, sir—

Mr. Susman: Just a moment sir. I would like to make a record on this, if your Honor please—

Chief Hearing Examiner: There will be no record made. You are out of order, sir. I have ruled. I will not hear you in this proceeding. We are off the record while you talk.

You may consult with the witness. That is the ruling, right or wrong.

You may have your exception to that, through the witness.

I will not hear you.

Mr. Bryant: May we, sir, have a short recess here to afford Mr. Schreiber an opportunity to consult with Mr. Susman?

Chief Hearing Examiner: Very well. Take ten minutes.

Mr. Bryant: May I say just at the moment, for the record, before we leave, that I, anticipating that a situation of this kind might arise, had a discussion with Mr. Susman before we came in here this morning, and fully acquainted him with the procedures which your Honor had laid down in this proceeding.

Chief Hearing Examiner: Very well, sir.

Mr. Bryant: Ten minutes, sir?

Chief Hearing Examiner: Ten minutes.

(At this point a short recess was taken, after which the hearing was continued.)

Chief Hearing Examiner: Are you ready to proceed, gentlemen?

Mr. Bryant: Yes, sir.

I think there is an open question on the record—if the reporter would read it.

(The question was read.)

Mr. Susman: Mr. Hearing Examiner, will [sic] all deference, your Honor—

Chief Hearing Examiner: I cannot hear you, sir. I will not.

Strike the statement.

Mr. Susman: I think I have a right, sir, to make a record in this matter.

Chief Hearing Examiner: You have a right to make a record through your client. This is not an adjudicatory proceeding. It is investigatory.

I will not hear argument or objections from counsel. The witness is at liberty to refuse for any reason you advise to answer any questions propounded here.

I shall not hear you.

I have not heard any other counsel in this matter.

Mr. Susman: Sir, no lawyer can operate effectively—

Chief Hearing Examiner: Strike the statement from the record.

I warn you, sir, I will have you ejected from these proceedings, if you persist in this contempt.

Let's proceed.

As a result of the ruling by the Chief Examiner, Mr. Schreiber stated that he was deprived of effective and knowledgeable assistance of counsel. He called attention to the fact [A. 7a]:

> Lawyers and witnesses have been told in these hearings that before an attorney may so much as talk to his client, the client must ask the Hearing Examiner's permission to speak with his lawyer. Now, no lawyer can function effectively as a lawyer under these circumstances. I vigorously and completely disagree with the ground rules of this

> kind. In my judgment, such ground rules deprive me and my company of the right to be accompanied, represented and advised by counsel. And I therefore respectfully decline to proceed further as a witness under the duress of such rules.

The Hearing Examiner refused to change his ruling and directed the witness to proceed to provide the material requested. Mr. Schreiber refused to do so for the reasons indicated. He thereupon left the stand.

On November 25, 1960, the Hearing Examiner filed with the Commission a Memorandum Opinion [R. 35], in which he reaffirmed his intention of limiting the role of counsel only to advising Mr. Schreiber "within established procedures." He also found the contention that the material sought by the Commission was confidential "to be without merit."

On December 2, 1960, the Commission Counsel who had participated in the proceedings filed on behalf of the Commission's Broadcast Bureau a "Memorandum in Support of Opinion and Proposed Action and in Opposition to Petition to Review" [Pet. Ex. 15L in the district court]. In that memorandum, the Commission Counsel took the position (advanced for the first time as far as respondents are aware, in the history of this series of hearings) that the Administrative Procedure Act was not applicable to hearings by the Commission of an investigatory nature (pp. 31-34 of Memorandum), that the "Commission Rules of Practice do not delineate the procedures which are required in investigatory proceedings" and that the Commission, pursuant to Title 47 of the Code of Federal Regulations § 1.10, could establish on an ad hoc basis whatever rules, regulations and procedures would, in the Commission's opinion, best serve the interest of the investigation (p. 34 of Memorandum). Thereafter,

the Commission affirmed the Hearing Examiner in all respects and left to the Hearing Examiner the responsibility for determining the extent of confidentiality to be accorded to the material elicited from respondents. In so doing, the Commission said one of the purposes of making the record public was to provide information *to members of the industry.*

Prior to the time set for the reconvened hearing, respondents' attorney moved that the subpoena be quashed and in the same motion, he suggested that, in order to avoid a needless expenditure of time and effort on the part of all concerned, Mr. Schreiber be permitted in the first instance to testify in a closed session and that the information so received be held in confidence until the court should have an opportunity to rule on respondents' contentions; should the Commission prevail, the information could be made public without any further action [R. 102-111]. This alternative was rejected by the Commission. At the resumed hearing, the Hearing Examiner reaffirmed his insistence that the "ground rules" continue to apply. When Mr. Schreiber declined to testify under the duress of such "ground rules", the Hearing Examiner warned Mr. Schreiber of the possibility that the criminal penalties provided in Section 409(m) of the Communications Act of 1934[2] would be invoked. [R. 94-95].

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[2] Section 409(m) reads as follows:

> Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, schedules or charges, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission, shall be guilty of a misdemeanor and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $100 nor more than $5,000 or by imprisonment for not more than one year, or by both such fine and imprisonment.

Upon Mr. Schreiber's refusal to retreat from the position that he and the company which employed him were entitled to the meaningful assistance of their counsel and that the information being sought from him should not be made public, the Commission filed a petition in the United States District Court for the Southern District of California for enforcement of its subpoena and orders. After two hearings the district court made its Findings, Conclusions and Order. Finding XI [R. 125] provides as follows:

> The record herein, including but not limited to, the testimony in the extensive hearings held by the Commission in its network programming inquiry, make it necessary that in protection of respondents' rights and to preclude disclosure of trade secrets of which competitors might take advantage, all further interrogation of, and all further testimony given by, respondents shall be given in non-public sessions, and shall be retained and maintained in confidence by the Commission.

The district court's order required, among other things, that [R. 129]:

> [A]ny further interrogation of respondents and any documents produced by respondents be taken and held by the Commission in private and confidential session, that the public be excluded therefrom, that all testimony adduced and documents produced be maintained in confidence by the Commission, that the Commission by motion duly made and served, may move the Court upon the conclusion of such interrogation and production for an order, should good cause exist therefor, permitting such testimony and documents to be made public, and that respondents shall retain the right to oppose such motion if and when so made.

3. It is Further Ordered that in the course of any further interrogation of respondents:

(a) . . . .

(b) Respondents shall have the right to have counsel accompany respondents when testifying, the right to have respondents' counsel object to any questioning by the Commission, its counsel or the Hearing Examiner deemed improper by respondents' counsel, the right to have counsel for respondents present on the record concise grounds and reasons for any such objection, and the right to have counsel for respondents, without interference by the Commission, its counsel or the Hearing Examiner, initiate advice to his client with respect to the propriety or legality of any question asked of his client and to advise his client not to answer any such question deemed improper.

On appeal a divided panel of the ninth circuit held that Section 6(a) of the Administrative Procedure Act, 60 Stat. 240 (1946), 5 U.S.C. § 1005(a)[3] did not require that respondents be afforded the right to counsel in all particulars as outlined in the district court's order, and modified the order accordingly; however, by the same division, the ninth circuit upheld the district court's order with respect to confidentiality. In ruling on the confidentiality issue, the majority stated [R. 144]:

We hold, therefore, that the Trial Judge did not abuse his discretion, but, on the contrary, estab-

[3] Sec. 6(a) of the Administrative Procedure Act reads in part as follows:

Any person compelled to appear in person before an agency or representative thereof, shall be accorded the right to be accompanied, represented, and advised by counsel or if permitted by the agency, by other qualified representative.

lished a fair and just procedure whereby a most important investigation could proceed without being unduly disrupted, obstructed or prolonged, and at the same time afford appellees protection against the improvident disclosure of possible valuable trade secrets.

The Commission, thereafter, on September 2, 1964, adopted an amendment to its Rules and Regulations [Petition for Writ of Certiorari, pp. 64-65] which guarantees to witnesses before it the right to counsel to which respondents have contended throughout they were entitled under Section 6(a) of the Administrative Procedure Act.[4]

ARGUMENT

Introduction and Summary

On the basis of a record which revealed that the Commission was seeking to probe deeply into the innermost business affairs of MCA, the district court, in the course of enforcing the Commission's order, has required that, preliminarily, testimony and documents obtained from respondents be held in confidence until the court has had an opportunity to evaluate the evidence so elicited and to make a determination as to the

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[4] In *Wanderer* v. *Kaplan*, 1962 Trade Cas. Paragraph 70,462 (D.C.D.C. Civil Action No. 2819-62), the court ruled that the Federal Trade Commission must afford to a witness in an investigatory proceeding the right to counsel as set forth in Judge Yankwich's order in the instant case. Thereafter, the Federal Trade Commission in a proceeding entitled *In the Matter of Mead Corporation* (File No. 571 0656), 13 Pike & Fischer, Admin. Law (2d) 117 (F.T.C. 1963), announced that it was amending its Rule 1.40 (since recodified as Rule 1.36) so that witnesses in investigatory proceedings before it would have the right to counsel which respondents in the instant case sought before the Federal Communications Commission.

need for continuing to maintain such evidence in confidence. Thus, this case does not involve the issue of whether the district court applied an appropriate standard in determining whether information should be publicly disclosed. It does involve the issue of whether the district court has power to require that interim confidentiality be afforded. The Commission's attack on the district court's order proceeds from a level of general abstractions concerning administrative law to an analysis of the impact of the district court's qualification of the Commission's order, all of which ignores what the district court in fact did and results in treating this case as if the district court had required that particular material be held in confidence for all time.

In framing its order as it did, the district court gave temporary recognition to MCA's need for maintaining competitive information in confidence, while at the same time holding for future determination, any claim by the Commission that it had been prejudiced in any way. The district court's actions were consistent with sound historical precedent which recognizes that agencies must be given latitute in formulating policies and procedures, but also recognizes that courts, when called upon to enforce agency process, have an obligation to prevent unnecessary harm from being inflicted upon private parties. Assuming that the district court has the power to modify the Commission's order as it did, in determining whether the facts warranted the exercise of that power, it is appropriate for this Court and the court of appeals to review the record only to the limited extent necessary to determine that the district court has made a conscientious and fair appraisal of the record.

I

THE RECORD AMPLY SUPPORTS THE IMPOSITION OF A QUALIFICATION UPON THE COMMISSION'S ORDERS BY THE DISTRICT COURT IN THE COURSE OF ENFORCING THOSE ORDERS

The facts as viewed from the perspective of the district court demonstrate that the district court acted well within its powers and quite properly in imposing a limited qualification upon the Commission's orders. The Commission's announced intention was to investigate "the policies, practices and activities of MCA, Inc., in connection with the production, casting, packaging, selection and sale of programs for television exhibition . . . ." [R. 16]. As part of the investigation, the questions put by the Commission to witnesses bear out that the Commission's interest in MCA was deep; concentration upon MCA was unique. Detailed corporate and financial data concerning MCA was introduced into the public record. Respondents are unaware of any other occasion during the hearing when even remotely comparable material pertaining to other companies in the industry was placed in the public record by the Commission or by any independent witnesses. During the hearings, it appeared as though MCA, rather than the television industry, was the true subject of investigation. When MCA requested that information furnished by it be held in confidence, its request was refused. When a spokesman for a network stated that he considered certain of his company's studies to be confidential, his claim was respected [Tr. 8961-8963; A. 17a-18a]. Similarly, information concerning network participations in programs was accorded confidential treatment by the Commission [Tr. 8137-8139; A. 8a-9a]. The hearing took place in an atmosphere in which respondents' counsel was threatened with being ejected

for contempt for attempting to afford respondents the rudimentary right to counsel seemingly afforded by Section 6(a) of the Administrative Procedure Act (and recently recognized by the Commission), and in which threats of criminal prosecution were made by the Hearing Examiner when Mr. Schreiber refused to testify.

Thus, the record before the district court, a record to which the Commission in its opening brief has hardly referred, reveals a particularized probing into the business of a company not subject to the regulatory jurisdiction of the Commission; the announced purpose of the investigation was not only to generate information needed by the Commission and Congress but, also, to provide information to "the public, station licensees, [and] the broadcast industry . . . ." [R. 10]. On the basis of this record the district court made its Finding XI, which has not been specifically challenged here by the Commission, as follows [R. 125]:

> The record herein, including but not limited to, the testimony in the extensive hearings held by the Commission in its network programming inquiry, make it necessary that in protection of respondents' rights and to preclude disclosure of trade secrets of which competitors might take advantage, all further interrogation of, and all further testimony given by, respondents shall be given in non-public sessions, and shall be retained and maintained in confidence by the Commission.

Faced with the situation outlined above, it is important to recognize what the district court did not do, as well as what it did do. Notwithstanding its Finding XI, the district court did not order that any information elicited from respondents be held in confidence

for an unlimited period of time; rather, its order was that the hearing, insofar as it pertained to respondents, be in private and that the evidence so elicited be maintained in confidence until the Commission should obtain an order from the district court permitting the disclosure. If and when the Commission should move for such an order, the district court would have before it the questions and answers and, therefore, would be able to make a complete appraisal of the factors militating both for and against disclosure.

How has this limited qualification interfered in any substantial way with the Commission's proceedings? The Commission argues [Br. 29] that public disclosure is especially important in order to enable other interested groups and individuals to "verify, refute, explain, amplify or supplement the record from their own diverse points of view", and in order to assist the Commission in making its annual report to Congress. These considerations would certainly have a bearing and arguably a heavy one, if the district court's order had not been limited so as to enable the Commission to move for an order authorizing disclosure. These considerations may have a proper bearing upon the standard to be applied when the Commission does make such a motion. But these considerations are not pertinent in assessing the validity of the order actually imposed by the distrct court, since, by hypothesis, disclosure is not permanetly curtailed. Indeed, on the very day of the termination of the interrogation of the MCA witnesses, the Commission would be free to move the district court that the evidence so elicited be publicly released.

To approach the matter from a slightly different vantage point, let us suppose that the district court had

not included in its order a requirement of interim confidentiality. Would the Commission have been in any better position than it is now? The district court's order also provides that respondents shall not suffer or incur any penalty should they refuse to answer any question until the district court has ruled in favor of the propriety of the particular question and respondents thereafter refused to answer the same. [R. 129-130]. *Cf. Reisman* v. *Caplin*, 375 U.S. 440 (1964). The Commission does not contend that this portion of the order is improper. Therefore, if the hearing had gone on and respondents had refused to answer a particular question or questions, the Commission would have had the choice of either going to the district court and requiring an answer after each refusal to testify, or of waiting until the end of the interrogation and then seeking an order requiring answers to all contested questions. At that point, respondents would be able to object to particular questions or would be able to seek confidential treatment for their answers. Any delays which are inherent in the procedure actually adopted by the district court are inherent in the approach which the Commission now apparently urges and, indeed, might be more aggravated under the Commission's approach. Until a final determination of the propriety of the particular questions is made, the answers will not be available either for use in the hearings themselves or for transmittal to Congress, regardless of whether the district court's order concerning interim confidentiality is upheld. Delays in the public disclosure of information sought by the Commission can occur, not because of the approach adopted by the district court, which is to settle all questions of confidentiality at one time with a record of the questions and answers before it, but because at this point in time the

questions have not been asked (nor the answers given) and because the statutory approach (as embodied in a portion of the district court's order to which the Commission has not objected) is that witnesses may not be compelled to testify until the court has had an opportunity to rule upon the propriety of particular questions.

The district court's order provides the most expeditious and least burdensome method for resolving any issues of confidentiality which could arise in the course of the resumed hearing. With interim confidentiality assured, it will not be necessary for respondents to refuse to answer questions in order to protect their position that the answers should not be publicly disclosed. Then, if there is a disagreement between the Commission and respondents as to whether the information should be publicly disclosed, the matter would be determined at one time by the district court without the need for any further proceedings. If the district court's modification with respect to interim confidentiality is reversed, then, at the resumed hearing, respondents will be forced to refuse to answer questions which they in good faith believe seek confidential information. A refusal to answer preliminary questions might obviously interfere with the Commission's later line of questioning. Either during the course of the hearing or at the end of the hearing, the Commission would have to resort to court process, again, in order to compel respondents to answer and the court would have to pass upon the issues of confidentiality without the benefit of a complete record of the questions and answers. Then, after the court has passed, as best it can, upon the issues of confidentiality presented to it, the hearing would again have to be resumed in order to obtain the testimony of respondents.

II

THE DISTRICT COURT WAS FOLLOWING SOUND AND HISTORIC PRACTICE WHEN, IN THE COURSE OF ENFORCING THE COMMISSION'S ORDERS, IT IMPOSED A LIMITED QUALIFICATION UPON THOSE ORDERS

We have no quarrel with the general proposition that an administrative agency must be given a degree of latitude in administering the statutory scheme for which it is primarily responsible. But the courts have been given two roles in the administrative process; one is to review the actions of agencies at the instance of persons affected thereby; the other is to participate, not as an intruder, in those situations in which Congress has withheld enforcement power from the agencies. When courts are called upon by an agency to enforce an agency order, weight must of course be given to the initial exercise of discretion by the agency, but the courts must also have a degree of discretion in framing their enforcement orders. These principles were voiced in *Hecht Co.* v. *Bowles,* 321 U.S. 321 (1944), in which the OPA sought to obtain an injunction against Hecht's selling products in violation of OPA regulations and requiring Hecht to keep certain records.

The Court was faced with language which literally read seemed to require that the trial court grant an injunction if requested by the Administrator. Nevertheless, the Court held that the trial court had a much greater responsibility in enforcing the provisions of the Act than such a literal reading would suggest:

> A grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended to make such a drastic

> departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made. (321 U.S. at 329).
>
> * * * *
>
> We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity." *Meredith* v. *City of Winter Haven,* 320 U.S. 228, 235, 64 S. Ct. 7, 11. The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied. (321 U.S. at 329-330).

The language of Section 409(g) of the Communications Act does not even purport to require a district court to issue an order to comply with a Commission subpoena; rather, the Section states that a district court "*may,* in case of contumacy or refusal to obey a subpoena issued to any . . . person, issue an order . . . ." (emphasis added). Thus, Section 409(g) contemplates that a district court will have at least the same degree of flexibility in determining whether to enforce Commission process as did the district courts in enforcing orders of the OPA.

In *National Labor Relations Board* v. *Eanet,* 179 F. 2d 15 (D.C. Cir. 1949) the court of appeals refused to enforce a Labor Board order where the evidence of an unfair labor practice was two years old. The court posed the question of its responsibility as follows:

> The important question in the case concerns the function of the court under the statute which controls us. Does the court have a modicum of judicial discretion in passing upon this petition for an enforcement decree? Or is it required to put the stamp of its authority automatically upon whatever request is made of it? (179 F. 2d at 20).

It answered its own question as follows:

> The Board was not given enforcement power; that power was lodged in the courts as a judicial function. Its exercise is not merely mechanical. The courts cannot, of course, refuse to issue enforcement decrees where the Board has found facts and reached conclusions which indicate that, in accordance with its judgment, enforcement is presently appropriate. But surely enforcement must appear to be presently desirable before the solemn power of the courts is brought to bear upon the dispute.
>
> * * *
>
> Law enforcement is an art; it is not the mere unthinking application of mathematical absolutes. Moreover, entry of decrees unrelated to present reality is not countenanced by our jurisprudence. (179 F. 2d at 21).

In *National Labor Relations Board* v. *Kingston Cake Co.,* 206 F. 2d 604 (3rd Cir. 1953) the court refused to enforce a Labor Board order requiring reinstatement of certain employees, emphasizing a factor which is present in the instant case, namely, that the non-tech-

nical nature of the particular issue did not call into play the assumed expertise of the agency.

> We are quite aware that administration of the Act was conferred upon the board and not upon judges of the courts of appeals. The Act is administered by a group of men whose constant, day-to-day touch with the problems of labor relations gives them a unique feeling for the appropriate solutions to the novel questions in the field. For this reason, their solutions are weighty when questioned before judges who are, usually, without that comforting familiarity. . . .
>
> We said recently, however, that "We approach the problem presented by the Board's petition for enforcement with the well-settled rule in mind that 'The powers conferred upon this court by the National Labor Relations Act to enforce the orders of the Board are equitable in nature and may be invoked only if the relief sought is consistent with the principles of equity.' " *National Labor Relations Board* v. *Globe Automatic Sprinkler Co.*, 3 Cir., 1952, 199 F. 2d 64, 70. Thus, while the board's discretion in ordering affirmative action is wide and should not lightly be disturbed, it has its limits. Certainly, a court of appeals has some responsibility for the effects of its own decree; this is especially so where it appears that enforcement would entail subversion, rather than effectuation of the legislative purpose. Furthermore, we are convinced that this is not a case in which administrative expertise is of compelling weight. It is not a problem of such great technicality that only experts can untangle it. (206 F. 2d at 611).

Emphasizing the equitable nature of courts' enforcement powers, the court in *National Labor Relations Board* v. *Central Mercedita, Inc.*, 273 F. 2d 370 (1st Cir. 1959) refused to grant summary enforcement of a Labor Board order in an instance in which the Board

urged that the respondent had waived its right to object because of the failure to send objections to the appropriate person within the time specified in the Board's rules. The Court said:

> Our enforcement powers being equitable in their nature, we look to the facts and circumstances of this particular case to see if the relief sought is consistent with the basic principles underlying the exercise of equity jurisdiction which are flexibility rather than rigidity and relief molded to fit the needs of the particular case. (273 F. 2d at 372).

Cf. Ford Motor Co. v. *National Labor Relations Board,* 305 U.S. 364, 373 (1939).

When agencies have sought federal court enforcement of subpoenas and similar process, the equitable principles discussed above have been applied, generally as a matter of course, so as to require the agency to afford confidential treatment to particular material. See *Federal Communications Commission* v. *Cohn,* 154 F. Supp. 899, 913 (S.D.N.Y. 1957); *Federal Trade Commission* v. *Menzies,* 145 F. Supp. 164, 171 (D. Md. 1956), *aff'd without point being in issue,* 242 F. 2d 81 (4th Cir. 1957), *cert. denied,* 353 U.S. 957 (1957); *Federal Trade Commission* v. *Bowman,* 149 F. Supp. 624 (N.D. Ill. 1957) (contention by defendant that "disclosure of confidential business information . . . might prove beneficial to competitors if made public" basis for requiring information to be held in confidence), *aff'd without point being in issue,* 248 F. 2d 456 (7th Cir. 1957); *Graber Manufacturing Co.* v. *Dixon,* 223 F. Supp. 1020, 1023 (D.C. D.C. 1963) (cited at page 28 of the Commission's Brief). See also *Chapman* v. *Maren Elwood College,* 225 F. 2d 230, 231 (9th Cir. 1955); *Walling* v. *American Rolbal Corporation,* 135

F. 2d 1003, 1005 (2nd Cir. 1943); *National Labor Relations Board* v. *Anchor Rome Mills,* 197 F. 2d 447, 449 (5th Cir. 1952). *Cf. Bank of American Nat. Trust & Sav. Assn.* v. *Douglas,* 105 F. 2d 100 (D.C. Cir. 1939).

The Commission misreads *American Sumatra Tobacco Corp.* v. *Securities and Exchange Commission,* 110 F. 2d 117 (D.C. Cir. 1940). In that case the company which was subject to the jurisdiction of the SEC requested the SEC to maintain in confidence certain financial information which had been filed by the company as part of its registration statement. The SEC pursuant to published rules and regulations held a hearing on this question, in the meantime keeping the information confidential. After the hearing, the SEC concluded that the information should be made public. An appeal was thereupon taken to the court of appeals. That court after reviewing the entire record sustained the SEC's action. There are several very significant distinctions between *American Sumatra* and the instant case.

In the first place, the issue in *American Sumatra* was not one of interim confidentiality as in the present case but rather was whether the material should be accorded confidential treatment for an unlimited period of time. By receiving the information in confidence originally and then not disclosing it until the court of appeals ruled upon the company's contention, the SEC was, for all practical purposes, following the same procedure of interim confidentiality which was adopted by the district court in the instant case.

Secondly, the court's emphasis in *American Sumatra* in refusing confidential treatment was upon the important place disclosure occupied in the statutory

scheme of regulation. Thus, the court said (110 F. 2d at 119):

> "Judged by this statement of policy [referring to Section 2 of the Securities and Exchange Act of 1934], it is clear that the Act contemplates publicity of corporate financial reports to insure the maintenance of fair dealing in the purchase and sale of securities not only for the benefit of the investing public, but as well for the protection of banks in which loans are collateralled by such securities."

The court continued (110 F. 2d at 120):

> "What does appear is that the obvious purpose and intent of the Act is a full and complete disclosure of each registrant's financial condition, including a true statement of its profits and losses from time to time. The general principle underlying this requirement is as apparent to the layman as to the expert, and grows out of scandals resulting from past frequent manipulation of securities by the "insider", to the detriment of the investor. To correct these abuses, no one doubts, was in the public interest, and while nothing unfair or improper is imputed to petitioner, the question whether its case presents such positive equities as entitles it to be excepted from the general rule is, after all, the only question for decision."

The court noted (110 F. 2d at 121) that the SEC had not justified its position on the grounds of a general rule or general policy. This analysis is further substantiated by an examination of the brief filed by the SEC with the court of appeals in the *American Sumatra* case. The argument made by the SEC was not that disclosure is important in order to enable it, the SEC, to make reports or to conduct an investigation (factors which would, of course, be present in any agency investigatory proceeding); rather, the SEC

urged that the very essence of the statutory scheme which it was administering required that the information sought from the company be made available to the public so that the public could make investment decisions based on such information, so that banks and institutional lenders could carefully evaluate securities which they were holding as collateral and so that stockholders and creditors of listed companies could learn whether or not such companies were being fairly managed. The SEC's brief drew heavily upon congressional history to emphasize its point that disclosure was an end in itself under the statutory scheme. Excerpts were included in its brief from the following reports: H.R. Rep. No. 1383, 73d Cong., 2d Sess., p. 11; S. Rep. No. 1455, 73d Cong., 2d Sess., p. 74; S. Rep. No. 792, 73d Cong., 2d Sess., p. 5.

At page 10 of the SEC's brief, it summarized its position as follows:

> "[T]he provisions requiring full and honest disclosure of corporate financial affairs as a prerequisite to the enjoyment of an exchange market, exemplify in a very real sense the basic philosophy of the Act. They demonstrate the conviction of the Congress that a free, fair, and honest market in securities cannot exist without full, fair, and honest publicity of all the facts material to the value of the securities traded."

Surely it is apparent, notwithstanding, the bold assertion in the Commission's brief to the contrary [Br. 24], that the Communications Act is not similarly based upon a "disclosure concept" and the public disclosure of the details learned in an investigation is not a vital and basic ingredient in the statutory scheme.

A further distinction between the instant case and *American Sumatra* is the fact that MCA is not subject to the regulatory jurisdiction of the Commission. The

Commission's position seems to be that since what is involved is an investigation, the only issue is whether or not the Commission has carte blanch to elicit any information its requests in the possession of respondents [Br. 24-25]. The Commission further urges that it would produce an "anomalous result" if the Commission could render procedural rulings against witnesses subject to its regulation more freely than against witnesses who are not covered by its regulatory powers. We submit that the Commission's analysis is wrong; in reaching its determination concerning the enforcement of an agency order, one of the factors which a court should be able to take into account is whether the particular company is engaged in an activity which is subject to the agency's regulation. A company voluntarily engaging in a business which is subject to an agency's jurisdiction must obviously expect a lesser degree of protection against intrusion into its activities than does a company not engaging in such a business.

In view of the minimal effect of the district court order upon the instant investigatory proceeding, we think it clear that the district court was acting well within its power when it modified the Commission's order to provide for interim confidentiality. Congress has committed to district courts the initial responsibility to enforce orders of the Commission. Since the district court's decision was reached after a conscientious review of the entire record thus far made, and since its evaluation of the record is clearly reasonable, neither this Court nor the court of appeals should attempt to make a minute re-evaluation of the entire record. As was stated in *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498 (1951):

> Were we called upon to pass on the Board's conclusions in the first instance or to make an inde-

> pendent review of the review by the Court of Appeals, we might well support the Board's conclusion and reject that of the court below. But Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. (340 U.S. at 502).
>
> * * * *
>
> This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should "adhere to the usual rule of non-interference where concluclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." *Federal Trade Comm'n* v. *American Tobacco Co.*, 274 U.S. 543, 544, 47 S.Ct. 663, 71 L.Ed. 1193. (340 U.S. at 503).

See also *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490-491 (1951); *National Labor Relations Board* v. *American Nat. Ins. Co.,* 343 U.S. 395, 410 (1952) (where the same rule was applied to a mixed question of law and fact, namely, the court of appeals' refusal to enforce a Labor Board order because of its disagreement with the Labor Board as to whether an employer had bargained in "good faith"); *Cf. Federal Trade Commission* v. *Standard Oil Co.,* 355 U.S. 396, 400-401 (1958).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals, to the extent that the Commission has sought review thereof, should be upheld so that the district court's order, with respect to interim confidentiality, will therefore be sustained.[5]

Respectfully submitted,

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March 22, 1965

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[5] We think it clear from the record that the district court's modification of the Commission's order was proper. However, should the Court determine that the district court employed an incorrect standard in reaching its determination, we join in the suggestion of the Commission [Br. 31, n. 16] that the case be remanded to the district court for judicial review under the appropriate standard.

Although we do not believe that the case is now ripe for a determination as to the proper standard to be employed by the district court in determining whether particular evidence which may hereafter be elicited at the hearing should be subject to public disclosure, the Court, in the exercise of its supervisory jurisdiction over lower federal courts, may deem it appropriate to suggest the proper standard.

APPENDIX

Part One

[Tr. 4924, L. 5—Tr. 4924, L. 23]

[R. 30] By Mr. Bryant:

Q. Now, Mr. Schreiber, I show you, or you have before you another copy, a matter now marked—a two-page document now marked Exhibit LA 240 for identification.

Now, does this document, sir, contain all of the information called for in paragraph A of the Annex to the subpoena? A. I believe that it does, yes.

Q. Well, do you know that it does, sir? A. Well—

Q. Or have you been advised? A. I have been advised that it does.

Q. I see. Thank you.

Mr. Bryant: May it please your Honor, I now offer as an exhibit in evidence a two-page document produced by Mr. Schreiber, pursuant to paragraph A of the Annex to the subpoena just read in the record, as an exhibit in evidence in this record.

Chief Hearing Examiner: It will be received in evidence.

* * * * * * * * * *

[Tr. 4925, L. 10—Tr. 4935, L. 24]

[R. 30] Q. Now, Mr. Schreiber, will you direct your attention to paragraph B on the Annex attached to the subpoena now Exhibit LA 239 in evidence, and tell me whether you have produced here this morning the information called for in that paragraph marked B? A. We have that information. However, we only will offer—

Q. Just a moment.

You do have the information with you, is that correct, sir? A. Yes.

Q. Well, will you now produce the information, sir? A. We will be happy to produce it on the basis of its being kept confidential.

Q. I ask you again, sir, will you produce the information for us here now as called for by the subpoena? A. I re-

spectfully submit that we cannot produce confidential information for this record.

Q. Well, now, is it your contention, sir, that the informa- [R. 31] tion called for in subparagraph B of the Annex is confidential, is that it? A. Yes, sir.

Q. Well, will you tell us, Mr. Schreiber—are you familiar with the testimony given here yesterday by the representatives of the William Morris Agency? A. Just by hearsay.

Q. I see. Well, generally, will you tell us why, if you wish to do so—why this information called for in subparagraph B is, in your judgment, confidential information? A. Well, this relates to personal relationships, agency relationships with the client. It is confidential in that these are matters really belonging to principals other than ourselves.

And we think that we, in effect, would be not only violating that fiduciary, but at the same time making available information that might be used detrimentally; it would be possibly advantageous to our competitors and people who might welcome that information.

And it has never been generally given.

It has been the policy of our company not to give this information. And it has been a policy for many years.

Q. Does that adequately state your position, sir? A. Yes.

Q. Now, may I call your attention, sir, to be sure that we are discussing the same thing here—this subpoena calls simply for a list of the programs.

You are aware of that, sir? A. Yes, sir.

Q. And, basically, those programs, translating this out of legalese into words that perhaps we can all understand—this, generally speaking—did you take in reading this, or were you advised, that this meant generally the programs in which you act as packager or selling agent; is that correct? A. Yes.

Q. I see.

And it is your position that you should not be required publicly to disclose even the names of these programs? A. Yes, sir.

Q. This category? A. Yes, sir.

[R. 32] Q. Is there anything further you wish to say in this regard? A. We would like to help the Commission in this regard, and feel that giving the Commission this information in confidence should serve its purpose.

We don't think, however, that it should be made a part of a public record that would therefore be available to people who otherwise could not have this information.

Q. Then, if I understand it, your position is that you are ready to supply the Commission in this proceeding with this information, but you do not wish to do so in a public context, is that correct? A. That might be interpreted various ways. I would rather state it in my own language, and that is that if the Commission will take this information and assure us that it will be held in confidence, will not be published, and will not be made available to other people, other than those on the Commission, and that serve the Commission, we are very happy to give this to the Commission.

Q. Well, perhaps we had better define this a little further.

In other words, you would be limiting this simply to the Commission and its employees, is that the case? You said the Commission or those who serve the Commission.

Would you care to consult with your counsel? A. Yes.

Mr. Bryant: May the witness consult with his counsel?

Chief Hearing Examiner: Yes.

By Mr. Bryant:

Q. You have consulted your counsel. Would you care to have the question reread, or do you have it in mind? A. I have it in mind.

Q. Yes, sir. Then would you give me your answer, please? A. On advice of counsel, I would prefer—we do not want to offer this to the Commission unless, as I say, it is kept confidential—primarily because we believe that this information and these facts that you request are really outside of the operation of this hearing.

Q. Well, I understood you to say that, sir. What was the [R. 33] last—that the facts are outside of the operation of the hearing—were those your words? A. Yes, sir.

Q. Now, I still am not clear, sir, and I think the record should be clear on this, because this problem has been raised, as you may know, in other contexts, in other proceedings.

When you say "confidential," what is it that you are asking that we agree to do with regard to holding the matter confidential? A. May I consult?

Mr. Susman [counsel for Mr. Schreiber and MCA Inc.]: Just a moment, Mr. Schreiber. I would like to be heard on this.

Chief Hearing Examiner: I am sorry, sir. The ground rules, as you may or may not be aware of—

Mr. Susman: I am aware of what has transpired with counsel in this proceeding, your Honor, but I don't quite agree with the concept of what the ground rules are. But, be that as it may, I think we are getting into an area now where Mr. Schreiber, who is not a lawyer, is not really in a position to be answering questions of this nature.

Chief Hearing Examiner: I am sorry. I believe I cannot hear you at all. Will you strike counsel's—

Mr. Bryant: Would it help if I—

Chief Hearing Examiner: Strike counsel's statement from the record.

[R. 87] He is at liberty, if he wishes, to consult with his client on the stand at any time, and, likewise, he is at liberty to consult with counsel for the network study office.

But I cannot hear argument of counsel—only statements of the witness, who will reflect the views of counsel whenever he desires to do so.

Mr. Bryant: Well, sir—

Mr. Susman: Just a moment sir. I would like to make a record on this, if your Honor please—

Chief Hearing Examiner: There will be no record made. You are out of order, sir. I have ruled. I will not hear

you in this proceeding. We are off the record while you talk.

You may consult with the witness. That is the ruling, right or wrong.

You may have your exception to that, through the witness.

I will not hear you.

Mr. Bryant: May we, sir, have a short recess here to [R. 88] afford Mr. Schreiber an opportunity to consult with Mr. Susman?

Chief Hearing Examiner: Very well. Take ten minutes.

Mr. Bryant: May I say just at the moment, for the record, before we leave, that I, anticipating that a situation of this kind might arise, had a discussion with Mr. Susman before we came in here this morning, and fully acquainted him with the procedures which your Honor had laid down in this proceeding.

Chief Hearing Examiner: Very well, sir.

Mr. Bryant: Ten minutes, sir?

Chief Hearing Examiner: Ten minutes.

(At this point a short recess was taken, after which the hearing was continued.)

Chief Hearing Examiner: Are you ready to proceed, gentlemen?

Mr. Bryant: Yes, sir.

I think there is an open question on the record—if the reporter would read it.

(The question was read.)

Mr. Susman: Mr. Hearing Examiner, will all deference, your Honor—

Chief Hearing Examiner: I cannot hear you, sir. I will not.

Strike the statement.

Mr. Susman: I think I have a right, sir, to make a record in this matter.

Chief Hearing Examiner: You have a right to make a record through your client. This is not an adjudicatory proceeding. It is investigatory.

I will not hear argument or objections from counsel. The witness is at liberty to refuse for any reason you advise to answer any questions propounded here.

I shall not hear you.

I have not heard any other counsel in this matter.

Mr. Susman: Sir, no lawyer can operate effectively—

Chief Hearing Examiner: Strike the statement from the record.

[R. 89] I warn you, sir, I will have you ejected from these proceedings, if you persist in this contempt.

Let's proceed.

[R. 33] The Witness: May I make a statement?

Chief Hearing Examiner: Let the witness make a statement.

The Witness: I came to this hearing with the expectations that I would testify on those subjects that were properly a matter of Commission interest and within the Commission's scope, authority and responsibility.

Mr. Bryant: Could you keep your voice up a little bit, Mr. Schreiber?

The Witness: And which, of course, would not require the public disclosure of trade secrets and confidential data of my company which might be of aid to its many competitors in this highly competitive television industry. [R. 34] I am a businessman and one, incidentally, who has every faith and confidence in the American principle of free enterprise. I am not a lawyer. I am not a lawyer. I do not profess to be an expert about legal matters. The course that the interrogation has taken during the past two weeks has made it abundantly clear to me and I presume to all disinterested observers that one of the primary purposes of these hearings has been to question and perhaps criticize the business practices of the television production business. [R. 89] Apart from the fact that such a purpose

is plainly wrong and unjustified, and outside of the Commission's authority, in the posture and context the hearings have taken, I feel that I should have the effective and knowledgeable assistance of counsel.

The so-called ground rules laid down by the Hearing Examiner in these hearings, beginning on October 10th and repeated from time to time as the hearings progressed, does not grant me or my company that right. On virtually every occasion when an attorney for one of the witnesses has attempted to make a statement or an objection, he has been summarily directed by the Hearing Examiner to be quiet and that he had no standing to say anything.

[R. 34] Lawyers and witnesses have been told in these hearings that before an attorney may so much as talk to his client, the client must ask the Hearing Examiner's permission to speak with his lawyer. Now, no lawyer can function effectively as a lawyer under these circumstances. I vigorously and completely disagree with the ground rules of this kind. In my judgment, such ground rules deprive me and my company of the right to be accompanied, represented and advised by counsel. And I therefore respectfully decline to proceed further as a witness under the duress of such rules.

Mr. Bryant: Does that complete your statement, sir?

The Witness: Yes, sir.

Chief Hearing Examiner: Just a minute. I direct you to return to the stand.

The Witness: I decline to return unless these ground rules are changed so that I can be effectively represented by my attorney.

Chief Hearing Examiner: The ground rules will continue. There is no doubt in my mind as to their validity. The Commisison concurs in that view.

Now, I direct the witness to return to the witness stand and answer whatever questions counsel may have relative to this proceeding.

The Witness: I decline.

Chief Hearing Examiner: Very well, sir. The record will show your position.

(The witness left the stand.)

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Part Two

[Tr. 8137-8139]

The Witness [James T. Aubrey, Jr., President of CBS Television Network Division]: They range from $500 for an outline of a program idea to a half-million dollars for a license of the television rights to an established literary work. They range from $300,000 for a single special program to a multi-million dollar series commitment.

In any given program project, the network may be an owner, a joint venturer, an employer, a distributor, a licensee, or some variation or combination thereof. Program projects may involve exclusive employment contracts, income deferment arrangements, profit participations, guarantees against earnings, corporate joint ventures, or corporate acquisitions.

The Commission has requested specific information concerning network rights in film programs licensed to CBS, its financial interests in these programs, profit participations, distribution arrangements, and other details. We have submitted this information in four charts, two of which identify these relationships. Copies are attached as Exhibits No. 4 and 4-A. The other two charts, submitted on confidential basis, measures those relationships.

(DOCUMENTS REFERRED TO WERE MARKED EXHIBITS 4 AND 4-A (CBS) FOR IDENTIFICATION.)

Mr. Bryant: May I interrupt there just a minute when you say confidential. That refers to some information which you have supplied us at our request, requested in the Chairman's letter which, if I am correct, involves matter which you consider to be of a competitive nature,

the disclosure of which would be damaging to you competitively, is that correct?

The Witness: That is correct, Mr. Bryant.

Mr. Bryant: And this matter was discussed between counsel for the Commission and counsel for your organization and the Commission notified you in the letter—I have forgotten the date—the letter setting out the procedures —that it had been decided that it would not be necessary for—to achieve the purposes of this inquiry, to require you to disclose that matter over your statement of injury to you competitively. Is that correct?

The Witness: I believe that is correct.

Mr. Bryant: Thank you, sir.

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[Tr. 8495-8498]

Mr. Bryant: You have MCA Artists, Limited. Would you clarify what you are doing there?

Mr. Harrison [W. Spencer Harrison, Vice President and General Business Manager, Talent and Contract Properties, CBS Television Network Division]: I would be happy to.

During the term of Mr. Sullivan's first contract with our company, he was represented by MCA individually, not in a package relationship. In 1956, I believe it was, we entered into a renogiation with Mr. Sullivan for his continued program with us. In that negotiation, he was represented by MCA. That negotiation resulted in a rather competitive relationship between ourselves and another network. One of the elements in that competition, or resulting from that competition, was an MCA Commission for the show for the above-the-line elements of the package.

Mr. Bryant: And what year was this?

Mr. Harrison: 1956, I believe.

Mr. Bryant: And the proposition, I gather, was that unless MCA packaged the show, you didn't get Sullivan. Is that what you mean when you say you were in a competitive situation with another network?

Mr. Harrison: The deal was presented to us as a deal that we had to meet.

Mr. Bryant: I see.

Commissioner Ford: Well, does that mean that Sullivan didn't get any more money, but MCA got ten per cent?

Mr. Harrison: I am sorry, Mr. Commissioner. Mr. Sullivan got a great deal more money.

Mr. Bryant: And MCA got ten per cent of that, ten per cent of the insurance—you say above the line. What is above the line?

Mr. Harrison: Above the line is only the creative elements. This being a live show, MCA did not commission the below-the-line elements of the program, which are furnished—our studio facility, our cameramen, etc.

The Chairman: I wouldn't ask you who created it?

Mr. Bryant: Well, now, what other situations have there been, sir, where you have been presented with a cold turkey proposition like this?

Mr. Harrison: Well, as I tried to explain to you, in the past four or five years, I would guess it is, most of the projects that now are presented with major name stars as such come into us via an agent representation at the very beginning. And those deals are based upon a price for the program. And while I am knowledgeable of the fact that the program is bearing a commission to the agent, and a ten per cent on the package, it doesn't make any difference from our point of view in purchasing it whether it bears that or not. We are met with a $50,000 for an original film price, or $55,000, or whatever it is. And it is not my job to look behind the $51,000 or the $55,000. The marketplace has shifted for that property.

The Witness: Mr. Bryant, in connection with this I would like to point out in the normal couse of casting shows, unless we are involved in a very, very major talent in the business, this presents no problem whatsoever. When we deal with the major talents, this possibility has already

been recognized by their agent, and they are presented to us on this basis as a package. But with individuals of lesser stature, we frequently are able to cast shows as we desire with the agent merely representing them and not the package.

. . . . . .

[Tr. 8771-8779]

Mr. Bryant: I see. Now, I call your attention to an article from Fortune Magazine of July 1960, entitled, "There is no show business like MCA Business," pages 114 to 120, 152 to 156. Are you familiar with that article?

The Witness [Robert W. Sarnoff, Chairman of the Board, National Broadcasting Company]: I am not sure, but I think I am.

Mr. Bryant: Well, may I show it to you, if you would like to see it. Or do you have it?

The Witness: No, I would like to see it.

Yes sir.

Mr. Bryant: Now, page 116, there is an underlined portion of that article that I have just handed you, is there not, sir?

The Witness: Yes.

Mr. Bryant: And does it read like this: "One spring night in 1957, Kintner and Chairman Robert Sarnoff called a meeting of the network program executives. After they had assembled, the door opened and in walked MCA Vice President David A. (Sonny) Werblin. Without any preliminaries, Kintner said to him, 'Sonny, look at the schedule for next season, here are the empty spots, you fill them.' The rest of the evening the NBC executives"—what I have apparently is a misprint. What is the next word you have in the article there?

The Witness: "meekly watched"?

Mr. Bryant: "meekly watched Werblin rearrange their schedule and insert new shows. When finished, the schedule showed 14 series eight and a half hours a week in prime

time, that MCA itself had produced or sold. And that is the way it remained."

Now, sir, have you ever read that article before?

The Witness: Yes.

Mr. Bryant: Is that a reasonably accurate account of a meeting among you, Mr. Kintner, and Mr. Werblin?

The Witness: It is totally false.

Mr. Bryant: I see. It appeared in Fortune Magazine, sir.

The Witness: That is what this tear sheet is from, yes.

Mr. Bryant: You say it is totally false.

The Witness: That is correct.

Mr. Bryant: That no such thing ever occurred?

The Witness: That is right.

Mr. Bryant: Now, in connection with the 1957-58 schedule, the '58-'59 schedule, and the '59-'60 schedule, and your present schedule—there is a rather high—and I have the figures here if you would like to see them—there is a rather high preponderance, is there not, of shows which are either produced or packaged—or sold by MCA?

The Witness: I don't have the exact figure. Stabile—

Mr. Bryant: May I show it to you?

The Witness: I would like to ask you, Mr. Bryant—I don't see the relationship between that and this article—at least this specific quote.

Mr. Bryant: Well, I don't think it would be proper for me to draw the inference. I think we will let the record speak for itself.

The Witness: There can't be an inference, if the article is false. Mr. Bryant, if I may—.

Mr. Bryant: Now, sir, I think you have there on that—and I don't have another copy of the article—but you have there a schedule which purports to show that—excuse me. NBC—this is on page 117 of the article, and this purports to be the network schedule which is referred to in this article. And—

The Witness: Let me make sure that you are right. This does not indicate what year the schedule is.

Mr. Bryant: Well, let me ask you a simple question.

Here it says that eight and a half—of fourteen series, eight and a half hours a week in prime time, MCA either had produced or sold. Now, can you tell me, sir, as the chief executive of the National Broadcasting Company, whether in the season referred to here there were fourteen programs constituting eight and a half hours a week in prime time in your schedule that MCA either had produced or sold.

The Witness: I don't have the answer to that, Mr. Bryant. But I believe that Mr. Stabile will have it.

Mr. Bryant: Well, can you supply that for us, sir?

The Witness: Yes, sir, we can.

Mr. Bryant: We have your figures for October 1960, December 1959, and I believe that Mr. Stabile is going to introduce the figures for November 1961, is that correct?

The Witness: That is correct.

Mr. Bryant: But in any event, you deny flatly that this is a correct account, or this ever happened?

The Witness: I certainly do. And I would like, if I might, to read you something in that connection, just to keep the record straight.

Mr. Bryant: Why, certainly. My question was going to be did you ever protest to the editors of Fortune, and did you inform them that this was, as you say, a falsehood—is that correct?

The Witness: That is what I said.

Mr. Bryant: Yes.

The Witness: I would like to read for the record a letter of November 21, 1961, for Mr. Kintner, to Mr. Max Ascoli, the editor and publisher of "The Reporter."

Mr. Bryant: Pardon?

The Witness: I would like to read a letter from Mr. Robert E. Kintner, the President of NBC—

Mr. Bryant: I thought it was to "The Reporter."

The Witness: Editor and publisher of "The Reporter." It will refer to this article.

Commissioner Ford: Is that a little "r" for "reporter" or a big "r"?

The Witness: A big "r"—"Reporter" magazine.

The Chairman: You go ahead and read it, Mr. Sarnoff.

The Witness: This is dated November 21, 1961.

"Dear Sir: I have read Nat Hentoff's article "The Octopus of Show Biz," published in the November 23 issue of The Reporter which includes a reference to me that is flatly erroneous in all respects. This reference states that "no one has yet denied" a report in Fortune Magazine regarding a meeting at NBC in which Mr. David A. Werblin, Vice President of MCA, was asked to fill in the open spots in our television network program schedule.

"No such meeting was ever held. Mr. Werblin was never asked to fill in our schedule. NBC itself selects the programs for its schedule on the basis of its evaluation of each program, and has never turned over to others the responsibility for selection and approval of programming to be broadcast on its facilities. The statement that "no one has yet denied" the Fortune Magazine story is also untrue, when it was brought to my attention. I denied it by letter to the Managing Editor of that publication.

"In order to prevent further circulation of this unfounded rumor, I am requesting that this letter be published in The Reporter."

I would also like to submit for the record a letter from Mr. Kintner of January 26, 1962, to Mr. Robert M. Wool, editor-in-chief of a magazine called "Show."

"Dear Sir: The article about MCA by Bill Davidson in the February 1962 issue of Show magazine includes a reference to me that is completely erroneous in all respects. This reference concerns "a persistent story, reported by 'Fortune' and related by eyewitnesses" to the effect that

Mr. David A. Werblin, Vice President of MCA, was asked at a meeting in 1957 to fill in the open spots in our television network program schedule.

"No such meeting was ever held. Mr. Werblin was never asked to fill in our schedule. NBC itself selects the programs for its schedule on the basis of its evaluation of each program, and has never turned over to others the responsibility for selection and approval of programming to be broadcast on its facilities.

"When the Fortune magazine article was brought to my attention, I denied it by letter to the Managing Editor of that publication. When this false report was subsequently repeated in an article in The Reporter, I sent that publication a denial which was printed in the December 21, 1961 issue of The Reporter.

"In order to prevent further circulation of this unfounded rumor, I am requested that this letter be published in Show."

Mr. Bryant: So that if there is a high—what might be—has been referred to as a high preponderance of MCA shows in your evening schedule for the past four years, this is simply a coincidence, based on your judgment that these are the best shows for the particular spots where they are placed in the schedule, is that correct?

The Witness: Referred to by whom?

Mr. Bryant: Pardon?

The Witness: Referred to by whom, Mr. Bryant?

Mr. Bryant: Will you read me back my question.

(The reporter read from his notes as requested.)

Mr. Bryant: You say where has it been referred to as a high preponderant?

The Witness: Yes.

Mr. Bryant: I do not know where it was used—those exact words, In the articles you have just referred to,

in "Show," in "Reporter," and in "Fortune," this is certainly the clear implication of what they said.

The Witness: I haven't read those articles, so I can't vouch for it.

Mr. Bryant: I have.

Now, may I ask you this. This is the question.

The fact that—we will be very specific, then, sir.

The fact that in your evening—and this is material which was furnished to us and was put in the record in this proceeding in Hollywood. The fact that for your regular schedule, October 1960, 6 to 11 p.m., you have ten shows in the schedule that were either produced by Revue productions or sold to you by MCA, that in the schedule for December, 1959, you have ten, and four—at present, in your evening schedule—and these are all six to eleven—this is November 1960—you have nine shows, all of which were either produced by [Revue] or sold to you by [Revue] —that that is simply a coincidence, is that correct?

The Witness: I don't follow what you mean by coincidence.

Mr. Bryant: Well—

The Witness: Coincidence in what respect? We have programs in our schedule—

Mr. Bryant: I believe you stated that—strike that. That you select yourself programs which go into your schedule, on the basis of your judgments as to what are the best programs, both in terms of your scheduling—is that correct?

The Witness: That is right.

Mr. Bryant: My question simply is, then, the fact that this number of programs that I have read, referred to in the Fortune article and the other articles, is simply a coincidence, is that right?

The Witness: Well, if you are asking me, Mr. Bryant, whether we have ten programs in the schedule that are either produced by Revue or are represented by Revue, and produced by others, if those are the figures, and we verify them, I will accept that. I see that it has no signifi-

cance whatsoever in terms of coincidence or anything else. They are there because we thought they were good programs and they ought to be in the schedule.

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[Tr. 8961-8963]

Mr. Bryant: Well, could you give us some sort of an estimate for the record as to what you devote to program planning?

The Witness [Hugh M. Beville, Jr., Vice President for Planning and Research, National Broadcasting Company]: Are you talking about program planning as distinct from program placement, program—

Mr. Bryant: That is correct.

The Witness: All the various other aspects we are referring to.

Mr. Bryant: Yes.

The Witness: I would say the program planning area, perhaps 15 per cent might be a reasonable figure. It will vary, of course, from time to time depending upon the particular projects or problems we may be working on.

Mr. Bryant: Now, do these projects result in studies, do they, sir?

The Witness: They result in studies. But more important, after our analysis and interpretation of the reports from the research companies, they result in findings and recommendations—conclusions and recommendations which we make on the basis of the studies.

Mr. Bryant: Well, could you provide us for the record, sir, with some of these studies that you have made, so that we could have them in the record? Or are they considered competitive data?

The Chairman: Well, some of them of course would be privileged. I am sure those that were done most recently we probably would be unwilling to put in the record. There might be some older ones that we could make available.

Mr. Bryant: Well, I can consult with your counsel about that.

The Witness: Yes.

Mr. Bryant: Thank you.

. . . . . .

[Tr. 9068-9077]

Mr. Bryant: Now, we had some testimony from CBS about this. Has it become a practice in the business, as you have observed it and participated in it, that if you want the services of a star, a desirable player, or perhaps a desirable director or perhaps a desirable writer, that it is represented by MCA, in the usual case wouldn't you have to permit them to represent the package and get a ten per cent fee over-all on that package?

Mr. Stabile [James A. Stabile, Vice President and Associate General Counsel, National Broadcasting Company]: Mr. Bryant, I cannot say in the usual case. It depends upon the nature of the show. We have had a number of shows that we have produced ourselves, individual shows and series, where we have engaged the services of producers and stars and have obtained them from talent agencies without the requirement of packages. On the other hand, if we are desirous of obtaining the services of an outstanding star for a series, the practice of the business, based upon his advice, the stars advice from his financial advisor, from his tax advisor, from his business advisor, is to offer himself as an entity, so that he can own some tangible assets, and in that instance it is a package.

Mr. Bryant: He offers himself as an entity. Now, what do you mean by that?

Mr. Stabile: He—

Mr. Bryant: Where does that fit into the schedule here that we are referring to? What entity does he become?

Mr. Stabile: He becomes a producing organization, or the owner of the producing organization.

Mr. Bryant: Now, does that become a component of the package, is that what you are saying?

Mr. Stabile: It becomes the package.

Mr. Bryant: I see. So that instead of representing

the individual, the talent agent represents this package that he has put together, is that right?

Mr. Stabile: That is often the case, yes.

Mr. Bryant: Well, normally the actor doesn't put it together, does he? Isn't it put together by the talent agent?

Mr. Stabile: It is put together, Mr. Bryant, from my experience, by the talent agent together with the very direct advice of the business [advisor] or of the star, who has determined that this is the way the star is to conduct his business.

Mr. Bryant: Well, we don't want to get too far into their tax affairs. I think the point is here, if you want to get the services of "X" in a film series, and he is represented by MCA, or William Morris, you will deal with MCA and William Morris, and they will be paid ten per cent of the over-all package, is that correct?

Mr. Stabile: If they deliver a package, that is true, yes.

Mr. Bryant: I see. Well, how do you determine—we had this with Mr. Colman on the cost. Is there some rule or custom in the business as to what constitutes a package?

Mr. Stabile: Well, Mr. Bryant, I think a package can most simply be defined as a grouping or combination of two or more elements that form part or all of a program.

Mr. Bryant: I see. Well, can a package—strike that. Can one qualify occasionally in representing a package merely by delivering the star? Have there been cases like that?

Mr. Stabile: Not to my knowledge, Mr. Bryant.

Mr. Bryant: Well, what is the minimum, then. You say two or more elements. What would two elements be?

Mr. Stabile: Two elements could be the script writer and the producer. Normally, it is a little bit more than two. But there have been instances where there have been just two.

Mr. Bryant: Well, now, other than guide—isn't the talent agent, while being a talent agent, under an obligation, Mr.

Stabile, in dealing personally with his client, from your knowledge of the business, to advise and assist the client for the ten per cent of his wages that he normally gets?

Mr. Stabile: Yes, that is true.

Mr. Bryant: Now, what does the talent agent do in a situation like this, in addition to what he is bound to do in his fiduciary relation to his client as talent agent to him personally. You are a lawyer, are you not, Mr. Stabile?

Mr. Stabile: Yes, I am. In my judgment, in addition to his fiduciary relationship in guding the future of the star, when a talent agent represents a package, he gets into the discussions involved with script acquisition, future of the show, selecting production facilities, advicing the package or the star as to the very many business risks that are involved.

Mr. Bryant: Well, now, I notice in a case or two here, sir—for instance, in Laramie—

Mr. Stabile: Yes.

Mr. Bryant: You have the packager's Review studio, and the agency representative's MCA.

Mr. Stabile: That is correct.

Mr. Bryant: Now, aren't they the same people?

Mr. Stabile: One is a subsidiary of the other, to my knowledge. I am not completely familiar with—

Mr. Bryant: Well, may I suggest that Review is a division of MCA, Inc?

Mr. Stabile: It may be. I am not completely familiar with it, Mr. Bryant.

Mr. Bryant: In other words, Review is Taft Schreiber, who is in charge of Review productions, as a vice present of MCA, Inc., isn't he?

Mr. Stabile: He may be. I am not familiar with—

Mr. Bryant: Well, tell me. You dealt, as a I understand it, with MCA, or did you, sir—in bringing Laramie to the network. Did you deal with Review and MCA.

Mr. Stabile: Your negotiations were primarily with MCA.

Mr. Bryant: I see. You are familiar with the negotiations though.

Mr. Stabile: Yes.

Mr. Bryant: Well, what was your understanding as to what MCA did on behalf of what appears to be either for which it presumably got ten per cent—or did they, in that deal?

Mr. Stabile: MCA, in representing Review Studios, assisted and counselled, to the best of my knowledge, in putting the show together, in obtaining the participants in the show, and assisted the network in sales of the show to sponsors.

Mr. Bryant: Well, let me see if I understand this.

You have a corporation called MCA, Inc.

Mr. Stabile: That is right.

Mr. Bryant: And I believe this record shows that Review Productions is a division of MCA, Inc.

Now, is Review paid a ten per cent—I mean is MCA paid a ten per cent fee for representing Review in instances of this kind?

Mr. Stabile: I am not aware of what Review pays MCA, Mr. Bryant.

Mr. Bryant: I see.

Mr. Stabile: I am not trying to doge the question. All I know is our negotiations were with MCA on behalf of the show.

Mr. Bryant: Well, now, whom do you pay?

Mr. Stabile: We pay MCA as agency for Review Studios.

Mr. Bryant: I see. In other words, you don't know, of your own knowledge, whether or not there is a ten per cent markup here from Review to MCA to you.

Mr. Stabile: Of my own knowledge, no, I do not, Mr. Bryant.

Mr. Bryant: And would that also be true of the Wagon Train, which is also produced—packaged, according to this exhibit, by Review Studios, and represented by MCA / You

don't know there whether there is a ten per cent commission involved?

Mr. Stabile: I don't know whether there is an actual payment from Review to MCA, no.

Mr. Bryant: Is there anyone else of you three gentlemen who does?

Mr. Scott: I do not.

Mr. Bryant: Well, now, you have been with NBC since before 1957, have you not, sir?

Mr. Stabile: February of '57.

Mr. Bryant: February of '57. Now, you were here, of course, when I examined Mr. Sarnoff about this general subject.

Mr. Stabile: Yes, I was, Mr. Bryant.

Mr. Bryant: And you heard his testimony that there was apparently no relation between the fact that you had a large number of shows represented by MCA in your schedule, and that this came about simply as a result of these shows being selected according to the process that has been described here, is that correct?

Mr. Stabile: Yes.

Mr. Bryant: In other words, you agree with Mr. Sarnoff's testimony?

Mr. Stabile: Yes. And I can only add, Mr. Bryant, that Review happens to be perhaps the most prolific producer of programs.

Mr. Bryant: May we have a moment here, sir?

The Chairman: Commissioner Bartley.

Commissioner Bartley: Mr. Stabile, you mentioned the MCA participation in the sales effort. Would you explain that a little more fully?

Mr. Stabile: I am sorry, Commissioner Bartley—participation in the sale to sponsors?

Commissioner Bartley: You mentioned the MCA participation in the sales effort of the Laramie show. Can you tell me how they participate, and how they—are they compensated for that additionally?

Mr. Stabile: If you are referring to the participation that I referred to in selling the show to advertisers, they are not compensated by us for that.

Commissioner Bartley: Well, now, can you tell me the extent to which they participated—how they—did they bring the advertiser to you?

Mr. Scott: May I, Commissioner Bartley?

Sometimes they do. A case in point in my testimony, when I referred to International Showtime, a program on Friday night in the current season, in that particular case, International Showtime was produced by an independent packager represented by MCA. The talent agent and the packager jointly went out and found the first advertiser, or interested and sold the first advertiser and came into us with underwriting for one third of the program in the beginning. That made the program more interesting to us. They then worked with our Sales Department in getting additional advertisers into the show.

Mr. Stabile: Mr. Bryant, may I make one clarification. This has to do with the agency commission. I answered that I do not know of my own knowledge what the payment relationship is between Review and MCA. And I do not. We are aware that there is included in the budget of the show a ten per cent fee which is considered a cost of the show budget. Whether in fact that ten per cent is paid, I am not aware of it.

Mr. Bryant: In other words, there is a ten per cent allowance in the budget for the normal agency fee, is that right?

Mr. Stabile: There is an allowance—at least we recognize that such an allowance may be there. Now, whether in fact it is paid, I don't know.

Mr. Bryant: Thank you.

Now, let me ask you just one further question here on this.

Bonanza you produce yourself, do you not?

Mr. Stabile: Yes, we do.

Mr. Bryant: Now, is this directly an NBC production, or is there another corporate entity involved?

Mr. Stabile: It is produced through another corporate entity. NBC does not have agreements with the unions that represent film production.

Mr. Bryant: Now, with regard to Bonanza, is there any agency representation there?

Mr. Stabile: On the show, you mean?

Mr. Bryant: Yes.

Mr. Stabile: No. NBC produces that show directly. It employs the producer, the writers and the cast.

Mr. Bryant: I see. Thank you.

The Chairman: Can we go back one minute. You mentioned that there was a ten per cent allowance in the budget on the show in the contracts you have with MCA.

Mr. Stabile: Yes.

The Chairman: Can you just give us an idea for the record what that ten per cent amounts to in the course of a year. You have got a number of shows with them. I wouldn't hold you to any specific amount.

Mr. Stabile: Well, I think we can give it to you in more specifics. But for example, Mr. Chairman, on a show that is licensed to us at a cost of $100,000, that ten per cent would represent $10,000.

The Chairman: Right. And what do you think that ten per cent amounts to in a course of a year, with the number of shows you have on the air now?

Mr. Stabile: I would prefer to supply that in more specifics, because I would not want to give you a rough estimate.

The Chairman: All right. But I will supply that for the record.

Mr. Stabile: We can give you our best estimate, Mr. Chairman.

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[Tr. 9081-9082]

Commissioner Ford: Do you have, for the years probably 1956, 1957, 1958, 1959 and 1960, the number of programs packaged in which MCA is the representative? In other words, what I would like to see is for the year 1956 a list of the nighttime line-up with those in which MCA is the packager or the agent, similar to Mr. Stabile's Exhibit No. 2-A. This is for 1961, for example. I would like to see this same information in that exhibit for 1956, 1957, 1958, 1959 and 1960. I don't expect you to have that in your pocket.

Mr. Stabile [James A. Stabile, Vice President and Associate General Counsel, National Broadcasting Company]: Commissioner Ford, we have, I believe, already furnished to the staff information for 1957 through 1960, sources of program.

Mr. Bryant: 1959, 1960, and 1961. I have not—we do not have the information prior to that.

Mr. Stabile: We can supply it, Commissioner Ford.

Commissioner Ford: Well, if you have not—that part of it which you have not already supplied.

Mr. Stabile: Yes, sir, we can supply that.

Commissioner Ford: I expect to ask both CBS and ABC to furnish this same information for the same years.

Mr. Stabile: Yes, sir.

Commissioner Ford: Because here, in this one, out of 21 nighttime shows, MCA has nine of them. And I am curious as to at what point in time MCA jumped maybe from one show up to nearly 50 percent of your nighttime line-up.

Mr. Stabile: We can give you the tabulation, Commissioner.

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[Tr. 9149-9151]

Mr. Bryant: I see.

Well, now two or three times we have had the question come up, Mr. Stabile, as to just what the situations with regard to MCA.

I gather that you did not know that MCA—Review Productions is a division of MCA?

Mr. Stabile: I am not aware of their corporate structure.

Mr. Bryant: Well, let me read you from this record, Exhibit LA237, which is in the transcript at 4916. And it says here, "Prior to the incorporation of the company in Delaware on November 10, 1958, there were five main MCA companies related through common ownership." Etc. And then a table down below. It says, Company before reorganization, after reorganization," and I am reading from the registration statements at the SEC.

"Review Productions, before reorganization, independent parent, after reorganization, merged." And it is now described as a division of MCA.

Mr. Stabile: Yes sir.

Mr. Bryant: Now, along these lines, the process you described yesterday of dealing with an agent, a talent agent, who represents, rather than an individual piece of talent, if that is the term in the industry—he represents a package, is this on the increase over the last five or six years?

Mr. Stabile: I don't believe that I can say that there has been any discernible pattern in that area, Mr. Bryant.

Mr. Bryant: Well, actually—let me read you from page 5 of Variety" for JUne 14, 1961. Now, MCA, to your knowledge, they started out, did they not, principally as a talent agent?

Mr. Stabile: To my knowledge, yes.

Mr. Bryant: I see. And they gradually came into the television business, is that correct?

Mr. Stabile: Yes sir.

Mr. Bryant: Now, let me call your attention to some figures here. It says here—and this is on page 12 of the issue of Variety I just referred to—"MCA Chairman Steil also utilized the Annual Meeting, the second since the company went public in '59, to express his pride in earlier released annual report figures that MCA's total income for 1960 at $67,317,103, just over $10 million more than 1959, and more than double the 1956 figure of $32,144,843."

And then it goes on to say, and apparently quoting the annual report—"Of the total gross income, MCA earned $57,593,078 from television film and studio rentals, at their Revue Studios in Universal City, up $9,456,700 from 1959." And then skipping over, it says, "The only dark spot in the report is a $81,500 decline in agency billings from $8,792,414 in 1959 to $8,710,914 in 1960."

So that there seems to be no doubt, does there, sir, that in MCAs case, at least, the bulk of their business is now in the area, either of the sale of television programs or in the packaging of television programs, or in the leasing of their studios for television programs, or for other activities connected with television programs. Is that how you read that?

Mr. Stabile: The figures seem to bear that out. They speak for themselves, Mr. Bryant.

Mr. Bryant: I see.

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